

BETWEEN HOME AND SCHOOL

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INTRODUCTION

Family law in the United States has long embraced the image of a triangle to describe the allocation of legal authority over childrearing. Parents, children, and the state stand at the three points of this triangle.¹ Much of family law concerns when parental authority over children should trump state interests, when state interests should trump parental authority, and when children's own rights should trump either. Although struggles over authority remain, a general principle has long been clear: absent abuse or other forms of perceived family default,² parents enjoy almost complete authority over their children

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¹ See, e.g., ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 795 (5th ed. 2005) (referring to "the triangular relationship between the child, the family, and the state"); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 *VAND. L. REV.* 427, 435 (2000) (discussing "perpetual stresses along three sides of a triangle with endpoints labeled PCS: Parent, Child, and State"); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 *VA. J. SOC. POL'Y & L.* 409, 422 (2005) ("As a teacher of constitutional and family law for over fifteen years, I have illustrated the tensions between parents, children and the state with a triangular diagram.").

² Such default can include poverty, poverty-related neglect, and divorce. See MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 313-14, 349-53 (1988) (discussing how families receiving financial assistance from the state are subject to strict state control); Clare Hunt-

at home, whereas the state may exercise authority over children at school by mandating school attendance and regulating educational curricula—even those of private and home schools. With limited exceptions, children have few rights in either realm.³

This settled equilibrium ignores a fundamental reality: children are not confined to home and school. Much of childhood takes place in spaces between home and school: in playgrounds, parks, child care centers, churches, community gyms, sporting fields, dance studios, music rooms, after-school clubs, and cyberspace. Family law has been virtually silent about what happens or should happen in these spaces.⁴ Either the childrearing that takes place in them is ignored altogether, or it is seen as an extension of the childrearing that takes place in either home or school,⁵ obscuring the distinct childrearing that can be

ington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 667-70 (2006) (discussing some states' frequent practice of removing children from their parents' care because of poverty-related neglect not involving physical abuse); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 581 (2000) ("Never-married or divorced parents are subjected to state investigation and direction on a scale that would be considered unthinkable in the context of married parents in an intact family.").

³ See Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29 ("The competition for developmental control of a child is classically framed as a competition between parent and state.").

⁴ Notable exceptions can be found in the work of Barbara Bennett Woodhouse and Kenneth Karst, both of whom have discussed how children are influenced by the media and advertising industries. See, e.g., Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 1002-11 (2003); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 97-119. For more discussion of Woodhouse's and Karst's work, see *infra* text accompanying notes 56-62. Other scholars have criticized the simplicity of the triangle model, but those scholars have limited their analysis to the context of abuse and neglect. See, e.g., Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1400 (1999) (criticizing the triangle as "an incomplete model for the complexity of family law, especially as it applies to abused and neglected children in the dependency system"); Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 351 ("The triangle of state, parent, and child that is usually invoked in family matters is too simplistic. It fails to reflect that the child has family connections, such as siblings, beyond the parent-child relationship.").

⁵ See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 24 (2006) (discussing "neighborhood organizations [that] provide after-school and athletic programs for children" as examples of "institutions of civil society" that "may also play a vital role in shaping and supporting families"); Woodhouse, *supra* note 4, at 86 ("The traditional paradigm pitting parents against the state is deeply rooted in American family jurisprudence. On one side . . . are parents and the private institutions—from soccer clubs to churches to boot camps for defiant teens—that families deputize as their agents in guiding their children's development and instilling in their children the values that they hold dear.").

performed between home and school by individuals other than parents, state actors, or children themselves. The triangle thus remains intact, and the spaces and actors between and around its three points are rendered invisible.

This Article explores what it would mean for family law to consider explicitly all of the sites of childrearing, the actors who occupy those sites, and the types of childrearing that take place at those sites. Part I draws upon social science literature to identify the diverse spaces of childhood and the actors who socialize children in those spaces. The social science literature confirms that home and school are indeed important sites of childrearing, but that children are also socialized in other spaces by various actors. The identity of those actors, and the degree of their influence, varies from child to child in ways that may correlate to class, race, geography, religion, gender, or parental philosophy. The important common denominator, however, is that the actors in these other spaces are rarely the children's parents or teachers. The social science literature reveals that children know that they are interacting with actors who are neither their parents nor their teachers—and that they respond differently than they would either at home or at school.

The current scope of family law implies that childrearing between home and school is not important to child socialization. The social science literature refutes this inference, explaining the vital roles that such childrearing plays in child development. It is not only social scientists, however, who have noticed the importance of childrearing that occurs between home and school. Though such childrearing has been largely ignored within family law scholarship, it played a pivotal role in a high-profile Supreme Court case: *Boy Scouts of America v. Dale*.⁶ *Dale* was not a family law case, nor was it framed as otherwise concerning childrearing, but the central question presented was who may control messages conveyed to boys during Boy Scout activities, conducted in various spaces other than home or school. The Boy Scouts argued that it had a First Amendment right to choose, free from state regulation, the adults who help the organization instill values in boys.⁷ James Dale, a troop leader who was expelled from the Boy Scouts after the organization learned he was gay, argued that the Boy Scouts was subject to New Jersey's public accommodations law, which prohibits private organizations like the Boy Scouts from dis-

⁶ 530 U.S. 640 (2000).

⁷ *Id.* at 644, 653.

criminating on the basis of sexual orientation.⁸ The Supreme Court sided with the Boy Scouts, holding that the organization was entitled to teach by example the values of heterosexuality.⁹ The case thus provides an opportunity to begin a legal exploration of the childrearing that exists between and around the three points of the family law triangle.

Part II proceeds to provide a family law reading of the *Dale* case, situating the holding in relation to family law's traditional approaches to questions concerning the allocation of childrearing authority. Although many commentators already have analyzed *Dale*, this Article provides the first analysis from a family law perspective. Analogizing the Boy Scouts's activities to those performed by parents within the home provides support for the Supreme Court's decision, as parents also are given much room to instill values in their children free from state regulation. Analogizing the Boy Scouts's activities to those performed at school provides support for the opposite result, because even private schools are subject to state regulations prohibiting discrimination. These conflicting outcomes indicate that analogies to home and school can be of limited utility when analyzing childrearing that takes place between home and school.

Part III therefore calls for a theory that acknowledges childrearing between home and school for what it is, as opposed to how it is similar to the childrearing that takes place at either home or school. Such a theory initially would not have to call for state regulation, or for nonregulation, in the spaces between home and school. Rather, the very acknowledgment of this childrearing could contribute to existing attempts within family law to better reflect the reality of family life. Beyond better reflecting the reality of family life, acknowledging this childrearing could also reshape aspects of family life. Family law's neglect of this childrearing, however benign, necessarily shapes family behavior to some extent: home and school are salient to parents and children in part because these are the spaces subject to explicit state regulation or nonregulation. Legal acknowledgment of the spaces between home and school could allow these other spaces to take on some of the socialization that is currently thought to be properly performed only at home or school.

Once childrearing between home and school is acknowledged, family law scholars could begin to address how the law should respond

⁸ *Id.* at 645.

⁹ *Id.* at 659.

to various attempts by parents, the state, and other actors to exert control over childrearing activities occurring in the spaces between home and school. Family law's current silence about this childrearing could reflect, by default, a normative view of parental control over children in all spaces but school. Pursuant to such a view, family privacy is not limited to the home, but rather attaches to the childrearing function—even when that function is performed outside of the home or performed by parental surrogates instead of parents themselves. If family law scholars do in fact support this view, it would be useful to have its rationale explicitly articulated, particularly because courts do not always reinforce parental control in the spaces between home and school. Indeed, various cases have upheld state regulations that temper parents' authority when their children are between home and school. These cases challenge the idea that there is broad support for a normative view that parents should control such childrearing.

The last Section of Part III posits the beginnings of an alternative normative approach to childrearing between home and school, one that supports parental prerogatives yet also calls on states to ensure that children are exposed to diverse ways of life in these spaces. This proposed theory is grounded in the value of liberal pluralism that permeates much of family law, but the theory also seeks to promote pluralism within the family. Childrearing between home and school thus becomes the exclusive domain of neither parents nor the state, but rather is acknowledged as a vital part of civil society and is sustained accordingly. Finally, Part IV offers a brief conclusion highlighting how this theory of childrearing might affect some of the foundational normative positions of family law as a whole.

I. THE SPACES OF CHILDHOOD

Much of family law revolves around children. For example, states specify who may be legal parents,¹⁰ the minimum level of care those parents must provide,¹¹ and the consequences for failing to meet that

¹⁰ For discussions of the various ways the states currently determine parental status, see June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1314-32 (2005); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132-43 (2006).

¹¹ See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 885 (1984) ("Parents must care for their child, support him financially, see to his education, and provide him proper medical care. They have the duty to control the

standard.¹² It is thus not surprising that family law's approach to children focuses largely on the allocation of childrearing authority between parents and the state. This focus is reflected in the titles of casebooks, such as *Children, Parents, and The Law: Public and Private Authority in the Home, Schools, and Juvenile Courts*¹³ and *Child, Family, and State*,¹⁴ as well as in casebook chapter headings like "Allocating Power over Children: Parental Rights and State Authority."¹⁵ The focus is also reflected in family law scholarship, with law review articles entitled *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*¹⁶ and *Allocating Developmental Control Among Parent, Child and the State*¹⁷ or containing section headings like "The Place of Children in a Dispute Between Parents and the State"¹⁸ and "The Vertical Context: Protecting Families Against the Government."¹⁹

Recent law review articles, both explicitly within family law and not, continue this trend. For example, Anne Dailey argues that family law should embrace a developmental approach to childrearing because that approach maintains that the early parent-child relationship, rather than school curricula controlled by the state, plays the determinative role in cultivating democratic skills and values in young peo-

child, and if they fail in this duty, they may be required to answer for the child's wrongdoings." (footnotes omitted)); Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty To Support and Right To Control Their Children*, 69 OR. L. REV. 689, 693-96, 702-09 (1990) (describing how "during the nineteenth century American courts and legislatures established that under the private law, parents have a legal duty to support their children" and delineating current obligations in the "intact family" and "the family following divorce").

¹² Namely, states may exercise jurisdiction over children when they are abused or neglected by their parents. Definitions of abuse and neglect vary from state to state, but all hinge on default of parental duties. See, e.g., Woodhouse, *supra* note 1, at 423 ("Provision of services and support [by the state] is the exception to the rule of autonomy, and generally must be tied to some finding or admission of family failure and dysfunction. . . . Thus, the model depends on parental fault as a predicate for state engagement in the life of the child.").

¹³ LESLIE J. HARRIS & LEE E. TEITELBAUM, *CHILDREN, PARENTS AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS* (2002).

¹⁴ MNOOKIN & WEISBERG, *supra* note 1.

¹⁵ SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS I* (3rd ed. 2004).

¹⁶ Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 311.

¹⁷ Buss, *supra* note 3, at 27.

¹⁸ Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 383 (1998).

¹⁹ Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 644 (1987).

ple.²⁰ A similar focus on allocating power between parents and the state can be found in a recent article by First Amendment scholar Eugene Volokh, who argues that parents in both “intact” and “split” families should have First Amendment rights to speak to their children free from state restrictions imposed pursuant to a “best interests of the child” custody standard.²¹

This focus on the appropriate allocation of childrearing authority between parents and the state reflects a deep concern about the socialization of children. Family law doctrine and scholarship emphasize that, although families are major sites for socializing children,²² states also play a socializing role by mandating school attendance, setting curricular standards, adjudicating custody disputes, and specifying the minimum requirements for childrearing within the home. Debate continues within family law about where to draw the line between parental and state authority, but three aspects of family law discourse have remained constant.

First, parents and the state exercise authority over children. This authority often is illustrated by inverting family law’s triangle image and positioning parents and the state at the top two points and children at the bottom point. This orientation of the triangle emphasizes that children are rarely given power to control their own destinies, but rather are subject to the decisions of either their parents or the state.²³ Parents and the states exercise different types of authority, however; parents exercise private power over children, whereas the states exercise public power. Therefore, other scholars flip the triangle back on its base, placing the state at the apex and parents and children at the

²⁰ Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 482–88 (2006) (arguing that “early caregiving” provides the optimal preconditions for developing children’s capacities for “personal choice and democratic participation”).

²¹ Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 712–21 (2006) (asserting that such restrictions violate the “parents’ self-expression interests and the children’s interests as hearers”).

²² See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); Woodhouse, *supra* note 1, at 409 (“Families not only nurture and protect children, but they also teach them to be citizens of a larger society.”).

²³ See, e.g., Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1318 (1994) (describing how disputes involving children are not in fact triangular but instead are “legally bilateral” because “the conflicts primarily involve the state and the mediating entity—the family or other custodian—without the independent, autonomous voice of the child being heard in the formal legal controversies”).

bottom two points.²⁴ This conception emphasizes that children exist with their parents in the lower, private realm, and that the state crosses into that “zone of privacy” only to further public goals, such as citizenship development and the protection of children’s general welfare; otherwise, parents have control over “personal values and choices regarding children’s development.”²⁵

Regardless of the orientation of family law’s triangle image, the three points of the triangle remain constant. This is the second point of agreement within family law discourse: that parents and the state are the primary, if not the only, actors who engage in the socialization of children.²⁶ Other actors are not part of the triangle, symbolizing the importance of parents and the state, as well as highlighting the law’s exclusion of other parties who could, and often do, influence children.²⁷

The final constant aspect of family law discourse spatially situates the socialization of children, at home and at school. Although this aspect of the discourse is often less explicit than the first two points of agreement, it flows naturally from those points of agreement. If parents and the state are the primary actors who engage in the socialization of children, and parents have authority over private matters, while the state has authority over public matters, then parents generally exert influence over children when they are at home, whereas the state generally can reach children only when they are at school and thus subject to state educational policies.

Scholars in other disciplines also have studied the location of child socialization. Most notably, sociologists and social geographers

²⁴ Barbara Bennett Woodhouse follows this approach. See Woodhouse, *supra* note 1, at 423; Woodhouse, *supra* note 4, at 88.

²⁵ Woodhouse, *supra* note 4, at 88; see also Woodhouse, *supra* note 1, at 423 (“As depicted in this diagram, the most salient fact about the relation of the family and the state is that authority over children is allocated to the private sphere of the family. It suggests that children only have a relationship with the state when the wall of family privacy has been pierced.”).

²⁶ For another example of this focus, see MCCLAIN, *supra* note 5, at 70 (stating that her approach “accepts the dual authority of parents and schools to nurture children’s capacities” because “[p]arents educate children about what it means to be part of a particular way of life; schools, through cultivating skills of critical reflection and perspective-taking, help children learn that there are other ways of life deserving of respect”).

²⁷ Cf. Buss, *supra* note 3, at 29 (stating that family law’s traditional view of the “competition for developmental control of a child . . . oversimplifies the field of potential competitors considerably”).

have increasingly examined the spaces of childhood.²⁸ This literature, much like family law doctrine and scholarship, acknowledges that home and school remain important sites for the socialization of children.²⁹ Nonetheless, the social science literature emphasizes that socialization also takes place in many other spaces, including public spaces such as municipal playgrounds, sports fields, and parks, as well as private spaces like churches, clubs, day care centers, and other locations of various after-school instruction.³⁰

That such spaces exist is common sense for most of us. Their importance may not be. These spaces often have been viewed as mere holding areas between home and school—as spaces of childcare or recreation, as opposed to spaces of child socialization or childrearing. The focus of family law tends to support such a view. The failure of most family law scholars to consider any spaces of child socialization other than home and school could suggest that these scholars believe that little meaningful socialization takes place outside of those two locations. The remainder of this Part first shows how social science literature refutes this suggestion; it then examines the legal implications of that literature.

A. *Social Science Insights*

Social science studies reveal that the spaces between home and school are far from meaningless. Instead, such spaces have func-

²⁸ For examples of social scientists' examinations of the spaces of childhood, see STUART C. AITKEN, *FAMILY FANTASIES AND COMMUNITY SPACE* 94-104 (1998); STUART C. AITKEN, *GEOGRAPHIES OF YOUNG PEOPLE: THE MORALLY CONTESTED SPACES OF IDENTITY* 1-26 (2001); *CHILDREN IN THE CITY: HOME, NEIGHBOURHOOD AND COMMUNITY* (Pia Christensen & Margaret O'Brien eds., 2003); *CHILDREN'S GEOGRAPHIES: PLAYING, LIVING, LEARNING* (Sarah L. Holloway & Gill Valentine eds., 2000); *COOL PLACES: GEOGRAPHIES OF YOUTH CULTURES* (Tracey Skelton & Gill Valentine eds., 1998); ALLISON JAMES ET AL., *THEORIZING CHILDHOOD* 37-58 (1998); ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 14-32, 165-97 (2003); CHRISTOPHER SPENCER ET AL., *THE CHILD IN THE PHYSICAL ENVIRONMENT: THE DEVELOPMENT OF SPATIAL KNOWLEDGE AND COGNITION* 3-11 (1989).

²⁹ See, e.g., Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34 *SOC.* 763, 770-76 (2000) (describing the relative effects of school and the home on the socialization of children).

³⁰ See, e.g., Sarah L. Holloway & Gill Valentine, *Children's Geographies and the New Social Studies of Childhood*, in *CHILDREN'S GEOGRAPHIES*, *supra* note 28, at 1, 19-20 (introducing various academic perspectives on the importance of geography in the socialization of children); see also *supra* note 28 (referencing a sampling of the social science literature that explores the spaces of child socialization).

tioned as more than places of play or childcare in the past,³¹ and they continue to play a vital role in children's socialization today. Studies of these spaces are complex, and an exhaustive review of all of their aspects is beyond the scope of this Article. Even so, the social science literature suggests that spaces between home and school contribute to the socialization of children in at least three important ways.

First, the social science literature emphasizes that childhood, although rooted in biological age, is also a social construction, constituted both structurally and through daily practice.³² In the Western world, much of this daily practice occurs at home and at school,³³ as family law scholars have emphasized. Nonetheless, the spaces *between* home and school also are vital to this daily practice. These "between" spaces are important in part because children actually spend time in

³¹ See, e.g., LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE 1876-1980*, at 273 (1988) (describing a "broader configuration of education" that had developed by the 1870s, consisting of "Sunday schools, academies, colleges, seminaries, publishing houses, libraries, almshouses, orphan asylums, reformatories, and the churches themselves"); Elizabeth A. Gagen, *Playing the Part: Performing Gender in America's Playgrounds*, in *CHILDREN'S GEOGRAPHIES*, *supra* note 28, at 213, 216-17 (discussing the "playground movement" in Cambridge, Massachusetts, at the end of the nineteenth century).

³² Thus, childhood is not a naturally occurring state, but rather is an "actively negotiated set of social relationships." Alan Prout & Allison James, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* 7, 7 (Allison James & Alan Prout eds., 1990). Indeed, conceptions and articulations of immaturity have varied across cultures and time. See, e.g., PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 15-133* (Robert Baldick trans., Alfred A. Knopf 1962) (1960) (tracing the development of the "idea of childhood" over time); Holloway & Valentine, *supra* note 30, at 2-6 (providing an overview of the literature on changing conceptions of immaturity); Allison James, *Understanding Childhood from an Interdisciplinary Perspective: Problems and Potentials*, in *RETHINKING CHILDHOOD* 25, 28 (Peter B. Pufall & Richard P. Unsworth eds., 2004) (arguing that "[t]he socially constructed character of childhood" is demonstrated by looking at "differing legal, social, and cultural expectations about children" across cultures); Prout & James, *supra*, at 7 ("The immaturity of children is a biological fact of life but the ways in which this immaturity is understood and made meaningful is a fact of culture."); see also VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) (tracking the evolution of the concept of childhood and the value of children between the 1870s and 1930s). Accordingly, although statements about children's needs may often be masked as empirical claims, they are almost always the product of social and cultural choices. See Martin Woodhead, *Psychology and the Cultural Construction of Children's Needs*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD*, *supra*, at 60, 60-66.

³³ See, e.g., JAMES ET AL., *supra* note 28, at 38 (discussing the ways in which families and schools play a primary role in the construction of childhood in the Western world, serving as "regimes of discipline, learning, development, maturation and skill").

them. But more saliently, home and school are defined against these other spaces; home and school could not fulfill their respective socializing roles without the “free” spaces surrounding them. Indeed, home and school acquire meaning for children primarily in contrast to the spaces that are not home or school. Understanding what happens outside of home and school is therefore crucial to understanding the socialization that happens within home and school.

Second, the social science literature delineates the manner in which children between home and school are exposed to community members who are neither their parents nor their teachers. The identity of these actors, and the degree of their influence, varies from child to child in ways that may correlate to class, race, geography, religion, gender, or parental philosophy. For instance, children from affluent families are more likely to be involved in organized activities between home and school than children from less affluent families, who tend to engage in more informal activities, often with other children.³⁴ This trend is consistent among black and white children,³⁵ although black middle-class parents are often more conscious than white middle-class parents about the racial composition of their children’s activities, purposely steering their children toward both all-black and racially mixed activities.³⁶ Similarly, religious parents often encourage their children to participate in activities sponsored by religious institutions, in addition to sports or arts-related activities.³⁷ Whatever the activity, children encounter community members during these activities, and these community members frequently convey information about community values and practices. This information does not replace the messages that children receive at home or school from their parents and teachers, but children do balance this information against those other messages.³⁸

³⁴ See LAREAU, *supra* note 28, at 35-36 (identifying various factors that lead to class disparities in differing forms of childhood activities).

³⁵ *Id.* at 240-41, 282.

³⁶ For examples of scholars noting these trends, see *id.* at 120-24, 168-69; Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 45, 54-55 (Evelyn Nakano Glenn et al. eds., 1994).

³⁷ For examples, see LAREAU, *supra* note 28, at 110-20, 185-86.

³⁸ See, e.g., Stuart C. Aitken, *Global Crises of Childhood: Rights, Justice and the Unchild-like Child*, 33 AREA 119, 123 (2001) (discussing how messages from outside the home are “received, internalized, resisted and mobilized” by children); Mary Gauvain, *Sociocultural Contexts of Learning*, in LEARNING IN CULTURAL CONTEXT: FAMILY, PEERS, AND SCHOOL 11, 12-19 (Ashley E. Maynard & Mary I. Martini eds., 2005) (examining

Moreover, the content of the information can be less important than the actors conveying the information and the location in which they do so. Because the information is not directly accompanied by the authority of a parent or teacher, children may be more or less receptive to it. In addition, because the information is conveyed in locations that are not generally associated with parental discipline or education, children may not even realize that they are receiving information, because they may be more focused on playing or taking a break from the lessons of home and school. Ideas of appropriate community behavior are often internalized in this way, particularly ideas regarding acceptable gender and racial performances, as well as information about other issues valued by the community and by various subcommunities.³⁹

Finally, children can create their own identities in these spaces between home and school and, in doing so, can influence other children's identities as well. By focusing on the respective roles of parents and the state in childrearing, legal scholars often ignore the roles that children play in both their own socialization and the socialization of other children.⁴⁰ The social science literature emphasizes that children are not just passive recipients of childrearing; rather, they also play an active role in shaping their own worlds and the worlds of other children.⁴¹ Indeed, children often may be more influenced by other

how "the child's participation in cultural activity" influences learning and socialization).

³⁹ See, e.g., Gagen, *supra* note 31, at 213 (describing how "[e]ducational establishments, loosely defined" are often "the spaces through which children become aware of, and begin reproducing, social identities that circulate through broader social space"); Fiona Smith & John Barker, "Out of School," *In School: A Social Geography of Out of School Childcare*, in CHILDREN'S GEOGRAPHIES, *supra* note 28, at 245, 247-54 (describing the role of British "out of school clubs" in shaping interactions between children and children's worldviews).

⁴⁰ See Buss, *supra* note 3, at 30 (identifying the child herself as "another, often overlooked, private competitor for developmental control" over children); cf. Rosalind Edwards & Miriam David, *Where Are the Children in Home-School Relations? Notes Towards a Research Agenda*, 11 CHILD. & SOC'Y 194, 195 (1997) (stating that the "prevalent home-school orthodoxy" in the field of sociology "does not consider children, either as individual or collective participants in the process" of education).

⁴¹ See, e.g., Prout & James, *supra* note 32, at 8 ("Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and of the societies in which they live."); Buss, *supra* note 3, at 34 (pointing out that a child necessarily exercises some control over her own development, "whether she likes it or not," because "[s]he reacts when parents, the state, or anyone else, acts in an attempt to shape her development, and she reacts to the host of environmental and cultural forces that exist without regard to her development"); Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*,

children than by their parents, teachers, or other community members.⁴² Of course, children's opportunities to express themselves and, in turn, to influence other children, are greater in some spaces than others. At home and school, their freedom is generally limited by strict schedules, school curricula, and discipline by parents or teachers. Children often enjoy more freedom between home and school, but not always. For example, playgrounds, parks, and streets generally provide more opportunity for self-expression and influence than is typically found at home or school,⁴³ whereas some religious or organized sports activities may provide less freedom. Regardless of the degree of freedom afforded to children in these spaces, however, children often express their identities differently than they would at school or home. This is because these spaces play a less dominant role in the structuring of childhood, and their boundaries are more ambiguous.⁴⁴

In sum, the social science literature reveals that the spaces between home and school are vital to understanding how children are constituted and socialized in our existing society. These spaces are important as locations, because they provide the boundaries of children's experiences of home and school. The contents of the spaces are also important, because children are exposed to diverse actors within the spaces, including other children, and children may perform their identities—and influence other children's identities—differently than they would at home or school. The spaces between

67 U. CHI. L. REV. 1233, 1233 (2000) [hereinafter Buss, *The Adolescent's Stake*] ("What matters to adolescent development is relationships with peers, because it is largely through these relationships that they pursue the difficult and important task of identity formation—the sorting and selecting of values, beliefs, and tastes that will define their adult selves.").

⁴² See, e.g., JUDITH RICH HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* 147-71 (1998) (describing the influences of peers on children's behavior); Buss, *The Adolescent's Stake*, *supra* note 41, at 1270-76 (exploring the role of peers in adolescence); cf. MCCLAIN, *supra* note 5, at 82 ("Public discourse tends to 'go to extremes' about families, assuming either that family structure alone wholly determines a child's fate, or that parents have almost no impact on their children's development, with peers exerting a far more important influence. The truth surely lies somewhere in the middle." (endnote omitted)).

⁴³ See generally Hugh Matthews et al., *The "Street as Thirdspace"*, in *CHILDREN'S GEOGRAPHIES*, *supra* note 28, at 63.

⁴⁴ See, e.g., Pia Christensen et al., *Home and Movement: Children Constructing "Family Time"*, in *CHILDREN'S GEOGRAPHIES*, *supra* note 28, at 139, 143-48, 153-54 (describing how children's understandings of themselves and their families is achieved through movement in, out, and around the home, and how movement in general is formative of children's social learning).

home and school, therefore, can tell us a great deal about the “who,” “what,” and “where” of the socialization of children in the United States.

B. *Legal Implications*

In contrast to the social science literature, family law’s focus on the respective roles of parents and the state in the rearing of children ignores any childrearing that is not performed at home or school by parents or the state. Socialization that occurs between home and school is therefore rendered legally invisible. If such invisibility reflects the view of family law scholars that little meaningful socialization takes place between home and school, the social science literature greatly challenges that view.

Alternatively, family law’s neglect of childrearing between home and school may reflect some scholars’ views about the proper scope of legal regulation. As discussed more fully in Part II below, families have long been afforded certain protections from such regulation.⁴⁵ Consistent with this respect for family privacy, once a parent-child relationship is established, it is generally seen as existing outside of the law except in two instances. First, the state may intervene, in order to protect the welfare of children, when parents fail to perform their childrearing responsibilities or cannot resolve disputes with a co-parent. Second, in order to ensure that children are properly prepared for the obligations of citizenship, the state may require families to educate their children. Childrearing between home and school falls within neither of these traditional exceptions to family privacy. Therefore, even if meaningful socialization takes place between home and school, this childrearing could be viewed as properly subsumed under family privacy, outside of the law’s reach.⁴⁶

This normative view of childrearing between home and school does not require family law to remain silent about such childrearing, however. The scope of family privacy—and its very existence—is hotly contested within the law.⁴⁷ Many scholars have long argued that fam-

⁴⁵ See *infra* text accompanying notes 112-126.

⁴⁶ Cf. Woodhouse, *supra* note 4, at 86 (describing how the “traditional paradigm” in family law aligns organizations “from soccer clubs to churches to boot camps for defiant teens” with private parental power).

⁴⁷ See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 128-33 (1989) (discussing four flaws with the public/private dichotomy); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1567-69 (1983) (asserting that “[p]olarizing the family and the market does not increase the

ily privacy should be tempered because it harms individuals with relatively little private power, particularly women and children,⁴⁸ and masks the various ways that the public and private realms are interdependent.⁴⁹ The very debate emphasizes that family privacy is a legal construct, a product of policy choices rather than a reflection of a pre-existing reality. The spaces between home and school thus need not be subsumed by an extension of family privacy. Moreover, as discussed more fully in Part III below, courts have viewed such spaces as worthy of regulation in several contexts.⁵⁰

In addition, even those who advocate expansive notions of family privacy could find it useful to examine the ways in which childhood is shaped and constructed by family law's nearly exclusive focus on the socializing power of parents and the state, at home and at school respectively. The social science literature is notably silent about the law's role in the construction of childhood. Many judges and legal scholars also have not explicitly viewed childhood as a social construction,⁵¹ instead viewing childhood—and the corresponding rights and disabilities that attach to it—primarily as a function of biological age. Nonetheless, laws in the United States have long reflected an understanding of childhood as a social construction, for they specify the different ages at which children become legal adults for purposes of marriage, sexual activity, employment, driving, drinking, voting, and criminal prosecution. Moreover, lawmakers have, at times, changed those ages for reasons other than new understandings of maturity.⁵²

possibilities available to individuals and the human personality,” and arguing that society should “transcend” the “market/family dichotomy”).

⁴⁸ See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974-79 (1991) (describing “the ways in which concepts of privacy permit, encourage, and reinforce violence against women”); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1037-68 (1992) (providing a historical analysis of power in family relationships).

⁴⁹ See, e.g., Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 1028 (1993) (“[T]he domestic sphere neither is nor should be a sphere free from governmental regulation; rather, the state properly defines many central aspects of family life.”); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1208 (1999) (“The metaphor of ‘symbiosis’ seems more appropriate than the separate spheres imagery: the family is located *within* the state. . . . [F]amily and state are interactive; they define one another.” (footnote omitted)).

⁵⁰ See *infra* text accompanying notes 176-192.

⁵¹ One notable exception is Barbara Bennett Woodhouse. See Woodhouse, *supra* note 4, at 113 (“Modern scholars recognize that childhood is a culturally constructed idea, rather than a universal fact.”).

⁵² See HARRIS & TEITELBAUM, *supra* note 13, at 494 (“The age of majority is arbitrary not in the sense that it is unreasonable but in that it is variable from time to time

Similarly, courts have determined that children enjoy adult-like rights of privacy and association for some purposes, but for other purposes, children must wait until adulthood before they may exercise full autonomy.⁵³ The legal meaning of childhood is thus fluid and shifting, and that legal construction affects children's experiences of childhood.

On a less explicit level, children's experiences of childhood are also affected by the law's focus on childrearing only at home or at school. The rights of parents to control childrearing in the home pursuant to notions of family privacy, and the right of the state to control—or at least regulate—childrearing that takes place at school, means that these spaces of home and school are salient to children, parents, and the rest of society. Other spaces, in contrast, can be seen as insignificant because they are not worthy of the law's protection or intervention, even if they are significant sites of learning and identity formation, as the social science literature illustrates. The law's focus on the appropriate allocation of childrearing authority between parents and the state can also create a perception of the child as an object to be possessed,⁵⁴ which, in turn, can affect children's perceptions of their own autonomy and of who should be significant in their lives. The law confines its analysis to whether children should belong to parents or to the state, instead of adopting a broader approach that considers how children are socialized by various actors in diverse spaces.

Childhood is thus shaped in part by the current scope of family law doctrine—both its substance and its omissions. These omissions, by their very nature, make certain childhood experiences invisible within family law discourse. Because family law itself is also a con-

and is often established to reflect some, but not all, levels of maturity and capacity.”); cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 n.152 (1991) (“[T]he Twenty-Sixth Amendment extending the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age.”).

⁵³ See, e.g., David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1117-20 (2003) (describing various ways in which “children occupy decidedly shadowy ground in the constitutional law protecting family privacy”).

⁵⁴ See Woodhouse, *supra* note 48, at 1114 (describing how the traditional focus on parents' rights to direct the upbringing of their children produces a conception of children as the “conduit for the parents' religious expression, cultural identity, and class aspirations”).

struction,⁵⁵ these experiences need not remain invisible. Over the past few years, two legal scholars have begun to examine this disconnect between law and reality in one particular context: the effect of the media and advertising industries on children's socialization. Both Barbara Bennett Woodhouse and Kenneth Karst have illustrated how these industries supplement, and often supplant, parental and state authority over children.⁵⁶ For Karst, "the media are performing much of the homogenizing, standardizing function once claimed for the common school,"⁵⁷ and they "compete . . . powerfully with parents' and schools' voices on sex and sexuality."⁵⁸ For Woodhouse, "[m]edia and marketing, far more than family or government, create and manipulate child and youth culture and are reshaping the ecology of childhood and youth."⁵⁹ In her view, "mass-media marketing" is "a potentially destructive assault on children's environment that we must strive to understand and attempt to regulate."⁶⁰ According to both Woodhouse and Karst, then, this type of activity between home and school presents a threat to family law's traditional approach to child-rearing and, at least for Woodhouse, a threat to childhood itself. In response, Woodhouse calls for a new legal paradigm, grounded in developmental psychology, in which parents become partners with the state and encourage the "government's role in preserving an ecological environment that supports children's healthy development."⁶¹ Karst, in contrast, is much less optimistic about the prospects of regulation designed to bolster the socializing power of parents or the state.⁶²

⁵⁵ See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 829 (2004) ("[L]egislatures, courts, and legal scholars have created the family law canon, and the family law canon has in turn shaped how these legal authorities and scholars think about family law, and how they teach their students and successors to view the field.").

⁵⁶ Karst, *supra* note 4, at 1002-11; Woodhouse, *supra* note 4, at 104-11. Given the nuanced analyses of these industries by Professors Woodhouse and Karst, this Article will not focus on commercial spaces between home and school, but instead will focus on other spaces that have been ignored within family law scholarship. For additional commentary on how children's actions are influenced by advertisers, see Stephen D. Sugarman, *Framing Public Interventions with Respect to Children as Parent-Empowering* 12-13, (U.C. Berkeley Pub. Law Research Paper No. 925246, 2006), available at <http://ssrn.com/abstract=925246>.

⁵⁷ Karst, *supra* note 4, at 1003.

⁵⁸ *Id.* at 1007.

⁵⁹ Woodhouse, *supra* note 4, at 92.

⁶⁰ *Id.* at 94-95.

⁶¹ *Id.* at 165.

⁶² See Karst, *supra* note 4, at 1004, 1028 (arguing that the power of law as a socializing force "is often an illusion").

This recent work of Karst and Woodhouse is significant, in that it acknowledges important socializing forces family law previously has neglected, in large part because they are not attributable to either parents or the state, at home or at school. Nonetheless, the media and advertising industries are not the only socializing forces between home and school, nor are all such forces necessarily harmful to children. Therefore, an acknowledgment of childrearing between home and school need not always inspire calls for increased state regulation or sighs of helplessness. Instead, an acknowledgment of all the types of childrearing between home and school can illustrate the diversity of this childrearing and highlight how, although ignored within family law, such childrearing has not always operated outside of the law's reach.

C. *Introducing the Boy Scouts*

The Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*,⁶³ discussed in more detail in Part II below, repeatedly addressed the desires of the Boy Scouts to "instill[] its system of values in young people."⁶⁴ The case is unique in that it concerned the teaching of children, specifically boys, in a context unconnected to parents or the state, at locations other than home or school. Thus, it does not fit within family law's triangle paradigm, but it undoubtedly concerns childrearing. Even so, the case has been viewed solely as a dispute between adults, having no relation to family law. In fact, family law scholars have barely commented on *Dale* at all. By leaving *Dale* to other legal scholars, family law scholars once again signal that childrearing performed between home and school, by neither parents nor the state, is insignificant or unworthy of legal attention. An examination of the Court's opinion reveals, however, that this is far from the case.

The Supreme Court ruled in *Dale* that the Boy Scouts could legitimately prevent James Dale, a gay man, from leading a troop of Boy Scouts in New Jersey, even though the Boy Scouts is considered a place of public accommodation under New Jersey law,⁶⁵ and New Jer-

⁶³ 530 U.S. 640 (2000).

⁶⁴ *Id.* at 644.

⁶⁵ *Id.* at 656-57 (noting that "New Jersey's statutory definition of '[a] place of public accommodation' is extremely broad," and has been applied not only to "clearly commercial" private entities, but also to "membership organizations such as the Boy Scouts").

sey's public accommodations law⁶⁶ explicitly prohibits discrimination on the basis of sexual orientation.⁶⁷ The New Jersey Supreme Court had ruled in Dale's favor, rejecting the Boy Scouts's argument that it should be exempt from New Jersey's public accommodations law because application of the law would violate the organization's First Amendment right of expressive association.⁶⁸ The United States Supreme Court reversed, however, in a five-to-four decision.⁶⁹ The Court reached its holding on First Amendment expressive association grounds, concluding that Dale's mere presence would infringe the Boy Scouts's First Amendment right to express its desired message regarding sexuality.⁷⁰ Although the Supreme Court's analysis focused on the speaker of that message—the national Boy Scouts organization—a closer look at the case reveals that the message would not have mattered but for its *recipients*: the boys of the Boy Scouts. *Dale* is thus a case about childrearing—more specifically, the socialization of boys—and who may make decisions about childrearing in one particular space between home and school.

Granted, the Supreme Court did not affix the label of childrearing to the activities at issue in *Dale*, nor did it mention the family at all. In fact, the Court barely even mentioned boys, the constitutive members of the Boy Scouts. Instead, the issue was framed as one pitting the rights of the group, the Boy Scouts, against the rights of James Dale. But Dale was asserting his right to lead and teach a group of boys. Dale thus sought recognition of a right to participate in the Boy Scouts's childrearing activities in his New Jersey community.

Commentators have found the Supreme Court's decision in *Dale* puzzling as a matter of First Amendment expressive association doctrine. The opinion seems at odds with the Court's prior expressive as-

⁶⁶ N.J. STAT. ANN. § 10:5-4 (West 2002).

⁶⁷ 530 U.S. at 659. Dale had grown up as a Boy Scout and began serving as an assistant scoutmaster in college. While at college, he also came out as gay and served as co-president of the school's lesbian/gay alliance. When Dale's involvement in the group was mentioned in a newspaper article, the Boy Scouts removed Dale from his position as an assistant scoutmaster. When Dale asked why, a local Boy Scouts executive wrote that the Boy Scouts "specifically forbid[s] membership to homosexuals." *Id.* at 644-45.

⁶⁸ Boy Scouts of Am. v. Dale, 734 A.2d 1196, 1228 (N.J. 1999).

⁶⁹ Chief Justice Rehnquist authored the majority opinion and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

⁷⁰ 530 U.S. at 653-59.

sociation cases, primarily *Roberts v. U.S. Jaycees*,⁷¹ *Board of Directors of Rotary International v. Rotary Club of Duarte*,⁷² and *New York State Club Ass'n v. City of New York*,⁷³ all of which applied state public accommodations laws to force groups to admit women as members. Because the facts in those cases were similar to those in *Dale*, yet the *Dale* outcome so different, commentators have been left with doubts about the continued validity of past expressive association doctrine, and with questions about the substance and scope of any “new” expressive association doctrine which may have silently guided the Court’s analysis.⁷⁴

⁷¹ 468 U.S. 609 (1984).

⁷² 481 U.S. 537 (1987).

⁷³ 487 U.S. 1 (1988).

⁷⁴ See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 601 (2001) (arguing that the Court effectively undermined its decision in *Jaycees* by allowing the Boy Scouts to define its expressive message during litigation, irrespective of evidentiary support and without judicial scrutiny); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1491-97 (2001) (tracing the move from the “old” to the “new” expressive association doctrine established in *Dale*); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1603 (2001) (noting in *Dale* “a distressing willingness to abdicate the role of assessing the bona fides of an organization’s claim about the degree of harm that would be inflicted by an individual’s presence”); Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1821-26 (2002) (discussing the “remarkable degree of deference” afforded the Boy Scouts in *Dale* and the extent of the Court’s departure in that case from previous doctrine); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 816-17 (2001) (arguing that *Dale* abandoned the established doctrine that “conduct law[s] of general applicability” do not trigger First Amendment scrutiny even where there is an expressive purpose to violate them).

Even commentators who support the outcome in *Dale* have questioned the Court’s application of the existing expressive association doctrine to reach that outcome. See, e.g., David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 124 (2001) (“*Dale* would be a much less confusing opinion if the majority had bitten the bullet and explicitly overruled *Roberts*.”); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120-22 (2000) (arguing that *Dale* was too narrowly decided and that all private associations that are not in a monopoly position should be exempt from antidiscrimination laws); *The Supreme Court—1999 Term: Leading Cases*, 114 HARV. L. REV. 179, 262 (2000) (“The Court could have found a more practically sound basis for its holding by considering whether the government may commandeer BSA’s expressive facilities as passive conduits for an ideological message the organization finds objectionable.”); see also Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 656 (2001) (“Looked at strictly as a First Amendment case, *Boy Scouts* may be something of a stretch, or at least an anomaly.” (footnote omitted)). Other commentators, however, have used the decision in *Dale* to examine problematic aspects of the Supreme Court’s past expressive association cases. See, e.g., Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 880 (2005) (“[T]he *Jaycees* approach

The outcome in *Dale* seems less puzzling, however, when one considers the membership of the Boy Scouts. *Dale* did not concern a social or business club consisting solely of adult members; rather, *Dale* concerned an organization made up of boys and those adults, primarily men, who want to teach, lead, and mentor boys. The Boy Scouts sought to exclude Dale based on the organization's view that Dale's mere presence as a gay man would contradict the messages that the Boy Scouts was attempting to impart to boys regarding issues of sexuality. At bottom, *Dale* is about boys and who may guide them on the road to becoming men.

The majority and dissenting opinions in *Dale* emphasized this childrearing mission, but then relied on traditional expressive association doctrine to reach their respective outcomes.⁷⁵ The majority began its focus on childrearing by finding that

the general mission of the Boy Scouts is clear: “[T]o instill values in young people.” The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts’ values—both expressly and by example.⁷⁶

Based on this factual finding, the majority then concluded that the Boy Scouts engages in expressive activity,⁷⁷ and that Dale's presence would “surely interfere” with that expression,⁷⁸ because the Boy Scouts seeks to instill the values of heterosexuality, as opposed to homosexuality, and the First Amendment protects the Boy Scouts's teaching-by-example method of expression.⁷⁹ Given these conclusions, the majority held that application of New Jersey's public ac-

to the value of association is wrongly message-based and excessively outwardly focused.”).

⁷⁵ Shiffrin, *supra* note 74, at 881 (“By and large, it was taken for granted by all the Justices in *Dale* that the standard test for freedom of association claims applied.”).

⁷⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-50 (2000) (citation omitted) (quoting the Boy Scouts of America mission statement).

⁷⁷ *See id.* at 650 (“It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”).

⁷⁸ *Id.* at 654.

⁷⁹ *See id.* at 655-56 (“The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.”).

commodations law in this case would significantly impair the Boy Scouts's ability to impart its desired values to boys.⁸⁰

The two dissenting opinions, by Justices Stevens and Souter, primarily challenged the majority's deference to the Boy Scouts's own formulation of the values it seeks to impart to boys,⁸¹ and the majority's conclusion that Dale's mere presence would convey a message about homosexuality. Justice Stevens, in particular, emphasized that there is "no basis . . . to presume that a homosexual will be unable to comply with [the Boy Scouts's] policy not to discuss sexual matters,"⁸² and he concluded that "[t]he only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment."⁸³

The majority's holding has some appeal under principles of expressive association; after all, views on sexuality are indeed a message. This appeal dissipates, however, when one examines why the Boy Scouts excluded Dale. It was not because of anything Dale said as a

⁸⁰ *Id.* at 656. The Court distinguished *Jaycees* and *Rotary Club* on the ground that requiring those groups to accept female members did not "materially interfere with the ideas [those groups] sought to express," *id.* at 657, although those groups had also claimed that the inclusion of women would impair the messages they sought to convey. *Id.* at 657-58. For example, the Rotary Club claimed that admitting women would destroy an "aspect of fellowship . . . that is enjoyed by the male membership" and hinder its ability "to operate effectively in foreign countries with varied cultures and social mores." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 541 (1987) (quoting and citing testimony of Rotary International's General Secretary). The *Rotary Club* and *Jaycees* Courts rejected such arguments, concluding that the relevant inquiry was whether admitting the undesired applicants would "impose[] any serious burdens" on the group's "collective effort on behalf of [its] shared goals." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 626 (1984); *Rotary Club*, 481 U.S. at 548. As Justice Brennan stated in *Jaycees*, admitting women did not require a "change in the Jaycees' creed of promoting the interests of young men," nor did it otherwise impede the organization's "protected activities." 468 U.S. at 627.

⁸¹ 530 U.S. at 665-78, 684-96 (Stevens, J., dissenting). Justice Stevens analyzed the Boy Scouts's published guidance and policy statements, concluding that teaching about sexuality, and particularly teaching about the undesirability of homosexuality, was not "part of the group's collective efforts to foster a belief." *Id.* at 677. Accordingly, in Justice Stevens's view, the Boy Scouts could not point to a sincere policy against homosexuality, nor could it connect that policy to the group's expressive activities. *Id.* at 677-78. Justice Souter more simply stated that his conclusion was based on the Boy Scouts's "failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." *Id.* at 701 (Souter, J., dissenting).

⁸² *Id.* at 691 (Stevens, J., dissenting).

⁸³ *Id.* at 696.

Boy Scout or because of anything he said to his troop. Nor was it because of anything he did as a Boy Scout or in front of his troop. Indeed, there was no evidence indicating that Dale's troop members, or their parents, even knew that he was gay.⁸⁴ Additionally, Dale testified that he had no intention of informing his troop of his sexuality or otherwise discussing sexuality.⁸⁵

Despite these facts, the Boy Scouts asserted that it could exclude Dale because it found that his mere presence—not any speech or conduct—conflicted with the Boy Scouts's desired message and its teach-by-example philosophy. The majority of the Court accepted this explanation, holding that Dale's silent presence infringed the Boy Scouts's speech. The Court's holding thus diverges from other First Amendment cases, where a particular individual's speech conflicted with the group's message.⁸⁶

Given the Court's emphasis on the Boy Scouts's childrearing role, however, it is not surprising that *Dale* differs from other First Amendment cases. Some commentators have concluded that homophobia explains the *Dale* majority's unique approach.⁸⁷ But *Dale* did not con-

⁸⁴ See *id.* at 697 (“[I]n this case there is no evidence that the young Scouts in Dale’s troop, or members of their families, were even aware of his sexual orientation.”).

⁸⁵ As Justice Stevens’s dissent stressed: “Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message.” *Id.* at 694-95; see also Tribe, *supra* note 74, at 650 (“[T]he inclusion of openly gay scout leaders cannot be assumed to result in infiltrating the Scouts with individuals interested in undermining the group from within, radically changing the Scouts’ Oath, or modifying the Scouts’ other defining documents.”).

⁸⁶ For example, *Dale* is distinguishable from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), because Dale, unlike the parade participants carrying banners in *Hurley*, was not identifying himself as gay or otherwise communicating about his sexuality.

⁸⁷ See, e.g., Chemerinsky & Fisk, *supra* note 74, at 613 (“The conservative majority . . . reinforces the sense that *Dale* is really about how these five Justices feel about homosexuality.”); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1291-92 (2005) (discussing the influence of “antigay prejudice” on judicial decision making); Hunter, *supra* note 74, at 1608 (“[T]he Court impliedly finds that almost any openly gay or lesbian person is radioactive.”); Arthur S. Leonard, *Boy Scouts of America v. Dale: The “Gay Rights Activist” as Constitutional Pariah*, 12 STAN. L. & POL’Y REV. 27, 32 (2001) (stating that *Dale* may be “yet another example of the ‘gay exception’ to the U.S. Constitution”). But see William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1074 n.197 (2004) [hereinafter Eskridge, *Lawrence’s Jurisprudence of Tolerance*] (“Once *Lawrence* and *Romer* replace *Hardwick* as the relevant background, however, *Hurley* and (even) *Dale* can be read as signals that the Court will protect both gay people and traditionalists where the Constitution requires.”); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1937-38 (2001) (arguing that Justice Stevens’s dissent in *Dale* was motivated by religious bigotry).

cern homosexuality in the abstract or in business-oriented social groups such as the Jaycees. Rather, the Court considered whether a group that instills values in boys could exclude homosexual men as mentors and leaders because the group considers homosexuality to be incompatible with masculinity and “the good life.”⁸⁸ As such, the Court confronted not just homosexuality, but the prospect of gay men equipping boys with the tools of manhood.

Dale is thus about a very particular type of speech, childrearing by example, which is difficult to distinguish from childrearing itself.⁸⁹ The Court had to consider, in essence, who may teach children by example free from state intrusion. Given this context, the outcome of *Dale* implicitly may be more about childrearing—and the deference traditionally accorded to certain types of childrearing—than about speech in general. Part II of this Article examines *Dale* from this family law perspective.

II. A FAMILY LAW READING OF *BOY SCOUTS OF AMERICA V. DALE*

Childrearing, like other family functions, has long been protected by notions of family privacy and autonomy. This protection has its origins in the nineteenth-century belief that life was properly divided

⁸⁸ See Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271, 318 (2003) (observing that the Boy Scouts attempt to “construct[] masculinity by excluding sissies and thus openly gay men”); cf. Stephen Clark, *Judicially Straight? Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 589 (2003) (stating that James Dale was not “the kind of dystopian exemplar of gender-rigidified heterosexual mating that the Boy Scouts desired in its role models”). The Boy Scouts is not alone in its view of homosexuality as incompatible with masculinity. For example, the Ninth Circuit has confronted, and rejected, assertions of that view in several employment discrimination cases. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (concluding that co-workers’ treatment of the plaintiff, a homosexual man, constituted “actionable gender stereotyping harassment” because the co-workers treated the plaintiff “like a woman”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (agreeing that “a man who is discriminated against for acting too feminine” has a valid claim under Title VII).

⁸⁹ In this way, *Dale* can be seen as similar to those custody cases that examine whether children need role models of the same sex in order to internalize “proper” or “healthy” gender and sexual performances. See, e.g., *In re F.W.*, 870 A.2d 82, 87 (D.C. 2005) (“The fact that petitioners are a same-sex female couple cannot, in itself, be presumed contrary to [a male child’s] best interests.”); *Levin v. Levin*, 836 P.2d 529, 532-33 (Idaho 1992) (addressing a mother’s argument that having a same-sex role model was in her daughter’s best interests); *Sandlin v. Sandlin*, 906 So. 2d 39, 41-42 (Miss. Ct. App. 2004) (affirming the decision to place a son in the custody of his father and a daughter in the custody of her mother because of the respective needs of “a strong father figure” and a “mother’s guidance and advice”).

between the public and private spheres.⁹⁰ Pursuant to this ideology, childrearing came to be seen as a private activity, to be performed in the privacy of the home.⁹¹ The state intervened in childrearing only to the extent necessary to protect children's welfare in situations where the state thought parents were defaulting on their duties,⁹² or to educate future citizens by requiring school attendance and setting policies for public and, to a lesser extent, private schools.⁹³ This allocation of authority has remained to the present day, and family law scholarship about the parent-child relationship takes it as a given, focusing almost exclusively on when the state should be able to trump parental prerogatives, and when parents should be able to influence state educational policies.

This legal treatment of the childrearing function ignores the fact that childrearing has never been performed exclusively at home and school, but also occurs in other spaces, such as Boy Scouts meetings. As discussed in more detail below, however, the holding in *Dale* can be

⁹⁰ See, e.g., NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 57 (1977) ("In an intriguing development in language usage in the early nineteenth century, 'home' became synonymous with 'retirement' or 'retreat' from the world at large."); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 17 (1985) (discussing how the nineteenth-century ideology of family governance glorified the separation of the republican family and the state); Olsen, *supra* note 47, at 1498-1500 (describing how the nineteenth-century family was viewed as a refuge from the market); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2147 (1996) ("Countless nineteenth-century accounts of the home depict the family as fundamentally distinct from other spheres of social life . . ."). Prior to the industrial era, the concepts of family, state, and market were more fluid and overlapping. For discussions of this interrelationship, see, for example, COTT, *supra*, at 59-62; Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 *HARV. L. REV. F.* 19, 20-23 (2006).

⁹¹ Prior to the nineteenth century, children often lived outside of their parents' homes. See, e.g., EDMUND S. MORGAN, *THE PURITAN FAMILY: ESSAYS ON RELIGION & DOMESTIC LIFE IN SEVENTEENTH-CENTURY NEW ENGLAND* 28-29, 36-38 (1944) (describing how many children lived in apprenticeships and other nonfamily situations during the seventeenth century). For discussions of how childhood came to be experienced primarily within the family home, see STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 58-60 (1988) (describing how "a new conception of childhood began to emerge" in 1830, pursuant to which "a growing number of parents, particularly in the Northeastern middle class, began to keep their sons and daughters home well into their teens and even their twenties"); WITOLD RYBCZYNSKI, *HOME: A SHORT HISTORY OF AN IDEA* 48-49, 77 (1986) (describing how, during the eighteenth and nineteenth centuries, children of the bourgeois began living at home during their school years).

⁹² See *infra* notes 115-119 and accompanying text.

⁹³ See *infra* notes 131-137 and accompanying text.

read as quite consistent with family law doctrine that generally protects parents' prerogatives to rear their children free from state intrusion, and, in particular, protects parents' right to exclude whomever they wish from the family home.⁹⁴ *Dale* thus suggests that notions of family privacy could attach to childrearing even when it is performed outside of the home by organizations that do not look like the traditional parent, but that function as parental surrogates. The space between home and school is thereby enveloped by an extension of the privacy of the home, leaving school as the sole domain where the state's interests in childrearing may trump private childrearing decisions.

Alternatively, however, the space between home and school could be viewed as an extension of *school*, confining parental prerogatives to the privacy of the home. From this perspective, parents still have a right, at home, to impart to their children whatever values they choose. Once outside the home, however, the state has more power. The state may compel school attendance and control public school curricula and policy.⁹⁵ Parents, consistent with their constitutional and common law rights to direct the upbringing of their children, may choose to send their children to private (as opposed to public) schools,⁹⁶ or even choose to home school.⁹⁷ These choices, however, are costly—in time, or money, or both. Moreover, even if parents are willing and able to bear the costs, parental choice does not insulate private schools and home schools from state regulation. Most pertinently, private schools are subject to state antidiscrimination laws: the state interest in preventing discrimination trumps any right that parents may have to use private schools to impart the virtues of discrimi-

⁹⁴ Many commentators have explored parents' seemingly exclusive right to make childrearing decisions. See, e.g., Buss, *supra* note 3, at 29 (discussing the traditional "exclusion of other private parties competing with parents for some or all control over a child's upbringing"). The state may sometimes mandate third-party visitation that is in the child's best interest, but such visitation does not entail entry into the home, and the Supreme Court has held that states must give considerable deference to parents' judgment before ordering such visitation, even when it occurs outside of the home. See David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1163-69 (2001) (discussing *Troxel v. Granville*, 530 U.S. 57 (2000), and examining the Court's consideration of parental autonomy interests in the context of child visitation).

⁹⁵ See *infra* notes 132-134 and accompanying text (discussing cases illustrating the state's broad authority to make education-related decisions).

⁹⁶ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

⁹⁷ See *DAVIS ET AL.*, *supra* note 15, at 34 (noting that all states permit parents to home school their children, so long as they meet state requirements).

nation to their children.⁹⁸ Analogizing the Boy Scouts to schools thus provides support for an alternative holding in *Dale*. The Sections below explore these two possibilities.

A. *Extending Home: The Boy Scouts as Parental Surrogate*

Traditionally, courts have considered the rearing of boys, as well as girls, in the context of determining the boundaries of parents' authority to direct the upbringing of their children. Obviously, the Boy Scouts is not a parent. Nonetheless, throughout the majority opinion in *Dale*, the Supreme Court focused on the rights of the Boy Scouts as an entity under the First Amendment, not on the rights of the Boy Scouts's members.⁹⁹ This approach represented a shift from the Court's prior approach in *Jaycees*, which primarily considered whether requiring the Jaycees to admit women, pursuant to Minnesota's public accommodations law, would affect the expression of the group's members.¹⁰⁰

The *Dale* majority did not provide any explanation for this shift. That may have been because it was obvious that the Boy Scouts's members, as minors, cannot make associational decisions on their own, but instead may associate only at the direction of their parents or other legal guardians. This reality did not require the *Dale* Court to analyze the rights of the Boy Scouts as an entity, however. Instead, the Court could have analyzed the associational rights of the parents who

⁹⁸ See *infra* text accompanying notes 138-143 (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976)—which held that private schools are not exempt from 42 U.S.C. § 1981 and therefore must admit African-American students—and emphasizing the fact that private schools are subject to Title VII).

⁹⁹ See Chemerinsky & Fisk, *supra* note 74, at 609 (“Simply put, the Court’s failing in *Dale* was its determining the expressive message of the group without any consideration of the views or rights of the members.”); Farber, *supra* note 74, at 1494-96 (“[E]arlier cases often focused on the participation of members in the association. The focus in recent cases such as *Dale*, however, is on the rights of the organization as an entity, not on the rights of its individual members.”). In dissent, Justice Stevens briefly considered the views of the members of the Boy Scouts, whether they be boys or their parents, when he emphasized that neither the scouts in *Dale*’s troop nor their families were aware of *Dale*’s sexual orientation. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 697 (2000) (Stevens, J., dissenting). During the rest of his dissent, however, Justice Stevens, like the majority, focused on the national leadership of the Boy Scouts, thereby emphasizing the views of the entity as opposed to the views of the entity’s members.

¹⁰⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); see also *id.* at 623 (“We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the *male members*’ associational freedoms.” (emphasis added)). For criticism of this focus on members, see Shiffrin, *supra* note 74, at 864-69.

permit their sons to join the Boy Scouts.¹⁰¹ That analysis, consistent with *Jaycees*, would have considered the messages that the parents sought to convey by permitting, and even encouraging, their sons to join the Boy Scouts. The case's outcome may not have changed,¹⁰² but the approach would have been consistent with existing expressive association doctrine.

That the *Dale* Court chose not to analyze the associational rights of the parents of the Boy Scouts could indicate that the Court saw the Boy Scouts as a particular type of entity: an entity functioning as a parental surrogate. Parents entrust their sons to the Boy Scouts, delegating a portion of their childrearing authority to the organization. The Boy Scouts may thus be more than an entity comprised of parents as members, each with their own views. Instead, the Boy Scouts could be seen as an entity that has partially assumed the authority of its members to rear their children, in effect becoming a parental surrogate.¹⁰³ Just as a parent is (or attempts to be) the final arbiter of the lessons her children heed, the Boy Scouts is the final arbiter of the lessons to which boys are exposed during their time with the Boy Scouts organization. Once parents choose to delegate a portion of their childrearing authority to the organization and permit their sons to remain affiliated with the organization, their own personal views become subordinate—or even irrelevant.

The *Dale* Court's deference to the Boy Scouts's message and teach-by-example approach supports this view of the Boy Scouts as a parental surrogate. When childrearing takes place within the home, parents generally have discretion to impart to their children whatever values they please and to exclude anyone they choose.¹⁰⁴ As discussed in more detail below,¹⁰⁵ this protection of parents' childrearing au-

¹⁰¹ Cf. Shiffrin, *supra* note 74, at 883 (asking "whether the proper characterization of the Boy Scouts is as an association of children or as a mixed association of adults and children").

¹⁰² It is unknown whether the parents in New Jersey supported the Boy Scouts's view about the suitability of gay troop leaders. As discussed above, the parents of the boys in James Dale's troop did not know that Dale was gay. See *supra* text accompanying notes 84-85.

¹⁰³ For a discussion of other potential parental surrogates, see Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 395-404 (2002) (including grandparents and "de facto" parents as parental surrogates); cf. *Parham v. J.R.*, 442 U.S. 584, 606-08 (1979) (holding that parents have the right to commit a child to a state mental institution against the child's wishes, so long as a "neutral factfinder," such as a doctor, agrees).

¹⁰⁴ See *supra* text accompanying notes 90-94.

¹⁰⁵ See *infra* notes 112-126 and accompanying text.

thority has both constitutional and common law origins. In the New Jersey courts, the Boy Scouts directly appealed to one strand of this protection of parental authority, arguing that the Boy Scouts's national organization, like families, could exclude Dale pursuant to the First Amendment right of intimate association. The New Jersey Supreme Court ultimately rejected the intimate association argument, holding that the Boy Scouts's "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association."¹⁰⁶ The *Dale* majority did not review that part of the state court's decision.¹⁰⁷

One commentator has argued that Boy Scout troops and dens, as opposed to the national Boy Scouts organization, do in fact function as "an extension of the boys' families" and therefore should be protected by the right to intimate association.¹⁰⁸ Indeed, if one considers the individual groups in which the Boy Scouts functions—the troops and dens, consisting of anywhere from eight to twenty boys—then the Boy Scouts organization shares at least four characteristics of many families. First, like families, the troops are relatively small groups. Second, minors are the focus of both groups.¹⁰⁹ Third, the Boy Scouts seeks to instill values in young people, a primary family function.¹¹⁰

¹⁰⁶ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1221 (N.J. 1999) (quoting *Bd. of Dirs. of Rotary Int'l. v. Rotary Club*, 481 U.S. 537, 546 (1987)).

¹⁰⁷ In dissent, Justice Stevens dismissed the intimate association argument as "impossible." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting).

¹⁰⁸ See John C. O'Quinn, "How Solemn Is the Duty of the Mighty Chief": *Mediating the Conflict of Rights in Boy Scouts of America v. Dale*, 120 *S.Ct* 2446 (2000), 24 *HARV. J.L. & PUB. POL'Y* 319, 357 (2000). The Boy Scouts even use some family terminology, assigning, for example, "den mothers" to each troop. See Poirer, *supra* note 88, at 277 n.17 (briefly discussing women's roles in the Boy Scouts).

¹⁰⁹ Of course, minors are not found in all families, nor does state recognition of families hinge on the presence of minors. Even so, family law, as well as the broader culture, often assumes that (at least heterosexual) adults will become parents and thus will focus some amount of their attention on their children. See Dolgin, *supra* note 18, at 362 ("[C]hildren remain central to understandings of family for both traditionalists and modernists."); cf. *Hernandez v. Robles*, 7 N.Y.3d 338, 378-79 (2006) (upholding a ban on same-sex marriage largely because "marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth"). For a discussion and critique of this "repronormativity," see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181, 183-97 (2001).

¹¹⁰ See, e.g., Dailey, *supra* note 20, at 434-35 (discussing how parents leave their imprints on children during children's development into fully realized citizens); Peggy

Fourth, both the Boy Scouts and families allegedly seek to instill values about gender and sex, aspects of identity that are foundational to state definitions of marriage and the family.¹¹¹ When one considers all four characteristics together—when the Boy Scouts is seen as a series of small groups made up of children and mentors performing a function traditionally performed by the family about subjects that are at the core of state definitions of family—it is plausible to conclude that the Boy Scouts constitutes a family-like intimate association.

It is not necessary, however, for the Boy Scouts to constitute an intimate association in order to enjoy the protections that attach to parental childrearing. Protection of parental authority is not grounded solely in First Amendment notions of intimate association. Indeed, most protections of parental authority sound in privacy rather than in speech or association. Constitutional rights to be left alone in one's

Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) (“For parents and other guardians, civil freedom brings a right to choose and propagate *values*.”).

¹¹¹ See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2d prtg. 2002) (describing how state laws concerning marriage “can shape the gender order”). This does not mean, however, that states encourage parents and children to talk about sex, or that states even permit parents to encourage their children to engage in sexual activities. For example, children ordinarily may not consent to their own medical care, but most states carve out exceptions that allow children to consent to their own care for the diagnosis and treatment of sexually transmitted diseases and pregnancy (except, in most states, when it comes to abortion). See, e.g., DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 769-70 (2d ed. 2003) (noting that “[m]ost states” have “limited medical emancipation statutes”). A common justification for these exceptions is that children will be too fearful or embarrassed to discuss these matters with their parents and, consequently, would not seek care if parental consent were required. *Id.* The state therefore does nothing to encourage discussions between parents and children and, in fact, provides the means for children to *avoid* them. Similarly, many states require parental consent or notification before a minor may obtain an abortion, but the minor must be provided with the option to seek a judicial bypass if she is sufficiently mature and does not wish to inform her parents. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

On the other side of the coin, children can face charges under state statutory rape laws even if they discussed their decision to engage in sexual activity with their parents and the parents gave their blessings. See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 142-46 (2d ed. 2004) (detailing state “age of consent” laws (internal quotation marks omitted)). Moreover, parents who have consented to their children’s sexual experimentation have faced criminal charges. See, e.g., Sharif Durhams, *DA Prosecutes Mom Who Gave Son Condoms*, MILWAUKEE J-SENTINEL, Jan. 15, 2001, available at <http://www2.jsonline.com/news/metro/jan01/condom15011401a.asp> (reporting that felony charges were brought against a mother in Sauk County, Wisconsin, for permitting her thirteen-year-old son to engage in sexual intercourse with his fifteen-year-old girlfriend).

home¹¹² and to direct the upbringing of one's child pursuant to the Due Process Clause of the Fourteenth Amendment¹¹³ converge to give parents almost complete authority over childrearing conducted within the home. As the Supreme Court stated in 1968, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."¹¹⁴ Parents are thus protected from intrusions by the state in many contexts, although the protection is not unlimited. Most notably, states may intervene in the parent-child relationship to further children's welfare in four general ways: intervening when there is abuse or neglect, requiring school attendance, limiting child labor outside of the home, and subjecting children who violate the law to juvenile or adult criminal court.¹¹⁵ Otherwise, parents have the right to direct the upbringing of their children, including the right to control the messages their children receive while under their care.

¹¹² First articulated as early as the 1920s, this right has been reaffirmed on several occasions. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the "right to be let alone" as the "right most valued by civilized men"); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (deeming statutes criminalizing the "private possession of obscene material" unconstitutional while upholding the right of states to regulate the distribution of pornography); *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring) (describing the home as "the sacred retreat to which families repair for their privacy and their daily way of living"); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (reaffirming the value of "[p]reserving the sanctity of the home").

¹¹³ *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the right "of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (discussing the right to "bring up children"); *see also Troxel*, 530 U.S. at 78 (Souter, J., concurring) (stating that parents have the right to "indoctrinate children" and to choose their children's social companions). *But see id.* at 91-93 (Scalia, J., dissenting) (refusing to recognize a "theory of unenumerated parental rights").

¹¹⁴ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹¹⁵ *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (stating that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare" and enumerating the first three exceptions to parental authority described above); *In re Gault*, 387 U.S. 1, 17 (1967) ("If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene.").

Although broad, this parental privacy right may not seem broad enough to encompass the childrearing activities of the Boy Scouts. The right is frequently viewed as attaching to parents as individuals, not to the family as a whole. Parents are endowed with individual legal rights that can be balanced against the interests of the state.¹¹⁶ Even when functioning as a parental surrogate, the Boy Scouts looks like a group, not an individual. The dispute over Dale's participation in the group only highlights the fact that the Boy Scouts is not like an individual with constitutional rights.

The Boy Scouts's activities could still be protected by notions of family privacy, however, because such privacy has also been extended to the family as an entity. At common law, privacy attached to the family as an entity, not to the individual members of the family, and it encompassed virtually all family functions.¹¹⁷ This entity-based privacy has also been recognized as a matter of constitutional law,¹¹⁸ creating two complementary and converging sources of family privacy. Pursuant to this broader, entity-based conception of privacy, the state regulates the entity only upon formation—that is, in defining marriage, parenthood, and the family itself—and in instances of what the state

¹¹⁶ See Dolgin, *supra* note 18, at 382 (describing both *Meyer* and *Pierce* as “premised on a deep-seated fear of state control and on a presumption that parents enjoy a natural right of control over their children”); John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 770 (1978) (“[I]f there are limits on what the state may do, it is because those who have primary control over the child have an interest, protected by the due process clause, in making decisions on the child's behalf.”).

¹¹⁷ See Dolgin, *supra* note 18, at 347 (“The law, reflecting the larger society, long presumed the autonomy of the family unit . . .”); Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 966 (1991) (“The common law privacy doctrine is not an individualized concept . . . it attaches to the entity of the family, not to the individuals that compose it.”); Fineman, *supra* note 49, at 1212-15 (describing cases that “illustrate the contours of the common law doctrine of family privacy”); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 55 (2006) (describing how privacy historically “enable[d] the family, under male authority, to function as a distinct unit within society”).

¹¹⁸ See Dailey, *supra* note 49, at 963 (“[S]ince the early part of this century, the family has been accorded constitutional protection independent of the liberties enjoyed by its individual members.”); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1543-46 (1994) (discussing how the marital unit as a whole was protected in *Griswold*, evoking common law notions of family privacy in a case about constitutional privacy, but in *Eisenstadt*, the protection was shifted to the individuals involved in the sexual relationship, reflecting individual notions of family privacy); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (recognizing, in a case litigated under the Fourteenth Amendment Due Process Clause, that the family is “a unit with broad parental authority over minor children”).

perceives to be family breakdown, such as divorce or custody disputes, or in cases of abuse or neglect.¹¹⁹ In the absence of such breakdown, most families, but not all,¹²⁰ are accorded privacy by being placed largely outside of the law's reach.¹²¹ The entity-based privacy right

¹¹⁹ See Fineman, *supra* note 49, at 1209 (noting that "the state is perceived as having a role only in the case of family default"); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 7 (1986) ("Public power becomes relevant only in exceptional circumstances, when parents default."). The state may also intervene when a parent dies, which could be viewed as the ultimate form of default. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 116 (7th ed. 2005) (discussing circumstances under which courts appoint "guardians of the person" for children when their parents die).

¹²⁰ Families often are not accorded privacy when the state employs more expansive, and more questionable, definitions of family breakdown. For example, Dorothy Roberts has illustrated how poor and African-American children are more likely to be removed from their homes by the state than any other group of children. Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125-26 (1999). Roberts effectively ties this removal rate to stereotypes of African-American parents, rather than objective assessments of abuse. *Id.* at 131. Martha Fineman has similarly illustrated how single mothers, particularly those who are poor and receiving direct financial assistance from the state, are deprived of entity-based privacy. Fineman, *supra* note 117, at 958-59; see also Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1243 (1999) ("A family's dependence on public aid has typically meant forgoing otherwise applicable privacy rights . . ."); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724-26 (2000) (book review) (discussing studies indicating that children are most often removed from their home because of poverty, rather than physical abuse). For a brief historical discussion of how some families have been more protected by family privacy than others, see Rutherford, *supra* note 19, at 634-35 (observing that "[g]ood families," those consisting of married parents and their natural children, "received nearly absolute protection" from state intervention, "while bad families," those following other models, "had virtually none").

¹²¹ The primary exceptions to this regime of entity-based privacy are state-mandated medical tests for newborns and vaccinations for children. See, e.g., *Douglas County v. Anaya*, 694 N.W.2d 601, 608 (Neb. 2005) (mandating metabolic testing for newborns despite parental objections on religious grounds).

that protects the family thus goes beyond individual protections,¹²² removing the family as an entity from the zone of state power.¹²³

Given the dependence of children, at least young ones, on their parents, this entity-based privacy usually amounts to parental autonomy—the right of parents to speak for their children and to make decisions about their upbringing, free from state intrusion.¹²⁴ As before,

¹²² Indeed, entity-based family privacy is often reined in by the constitutional rights of individuals, because those individual rights can be invoked against other family members. See Dailey, *supra* note 49, at 1019 (“Under the doctrine of individual privacy, the state has a basis from which it may penetrate the intimate family unit.”); David D. Meyer, *Domesticating* Lawrence, 2004 U. CHI. LEGAL F. 453, 481 (noting “the possibility that constitutional privacy will be invoked by one family member against another in intrafamily disputes”). State laws permitting unilateral no-fault divorce also could be seen as providing individuals with the tools to overcome entity-based family privacy. Cf. GROSSBERG, *supra* note 90, at 29-30 (describing how, in the nineteenth century, the importance given to entity-based privacy meant that conflicts between individuals and families were generally resolved in favor of the family).

¹²³ See Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 1976 BYU L. REV. 605, 617 (describing common law privacy as “plenary,” meaning that parental power “prevail[s] over the claims of the state, other outsiders, and the children themselves unless there is some compelling justification for interference”); Rutherford, *supra* note 19, at 631 (stating that, traditionally, “[t]he inherent value placed on family unity meant that courts were reluctant to intervene in family affairs on behalf of individuals”).

¹²⁴ Because entity-based privacy exempts families from state power only, it does little to protect vulnerable family members, particularly children, from internal family disputes or other displays of power. See, e.g., Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174-80 (discussing how family privacy historically reinforced husbands’ authority over their wives and children). Thus, children can be adversely affected by the legal exemptions that result from entity-based family privacy. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1255 (1999) (arguing that preventing “state intervention in a ‘unit’ composed of members of unequal power . . . means that the dominant member is free to engage in clearly (although not grossly) wrongful conduct while the dependent members are compelled to suffer it”); cf. Dolgin, *supra* note 103, at 346 (“[A]n evolutionary shift toward the recognition of adults within families as autonomous individuals became revolutionary in the last decades of the twentieth century. Society did not, however, comparably reconstruct its understanding of children, and it still views them as dependant and vulnerable.” (footnotes omitted)).

Moreover, constitutional notions of privacy rarely endow children with rights that can be invoked against their parents. See, e.g., Lee E. Teitelbaum, *Children’s Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 810-15 (1999) (attempting to answer the question: “But how can the Supreme Court have held that children have autonomy-based rights in the midst of a legal setting that supposes that children are obliged to accept parental and governmental control regarding health, education, housing, and the like?”). Notable exceptions include the rights of adolescents, without parental consent, to obtain contraception, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693-702 (1977) (plurality opinion), and to seek an abortion upon a judicial finding of sufficient maturity, *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979); see also Garvey, *supra* note 116, at 789-805 (discussing *Bellotti* and *Carey* and exploring possible reasons

this autonomy is tempered by the state's interest in protecting and educating future citizens.¹²⁵ Parents must therefore send their children to school, or create a school within their home, and must abide by legitimate educational requirements imposed by the state. Once out of school and within the home, however, parents are outside of the zone of state power. Parents are thus free to impart to their children whatever values they please and to exclude anyone they choose from the family home.¹²⁶

The Boy Scouts, as an entity engaged in childrearing, could arguably be entitled to similar autonomy. Once parents decide to delegate a portion of their childrearing authority to the Boy Scouts, then the Boy Scouts may, under this reasoning, make determinations, free from state intervention, about who may rear the children under its care. Indeed, *Dale* could be read as suggesting that the state should defer to childrearing decisions even when childrearing is performed outside of the home, by organizations that do not look like the traditional family, but which function as parental surrogates. This family law analysis could provide the majority opinion in *Dale* with some much needed coherence.¹²⁷

One objection to such an analysis is that courts have traditionally recognized parental authority with respect to household and educational matters only. Most notably, the Supreme Court held in *Prince v. Massachusetts* that parental prerogatives did not trump state interests

for granting these rare rights to minors in the contexts of contraception and abortion). Minors may also seek emancipation from their parents as a matter of state law. See, e.g., CAL. FAM. CODE § 7120 (West 2003).

¹²⁵ See Hafen, *supra* note 123, at 625 (“The common law and constitutional developments concerning parental rights are mutually reinforcing and arrive at the same basic posture—children should be subject to the custody and control of their natural parents until the parents’ conduct falls below the minimum standards established [by the state].”).

¹²⁶ Perhaps most notably, parents may even exclude a child’s grandparents. *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000).

¹²⁷ To my knowledge, other scholars have not explicitly analyzed *Dale* along these entity-based family privacy lines. For analyses that are close, see Eskridge, Lawrence’s *Jurisprudence of Tolerance*, *supra* note 87, at 1075-76 (reading *Dale* as telling traditionalists that “gay people [cannot] do bad things to you,” and that “[y]our youth group is a safe place for you to express and inculcate your values, and it goes without saying that your home, your church, your parochial school, your other normative associations are all enclaves where the state cannot impose politically correct or progay values on you”); Shiffrin, *supra* note 74, at 885-86 (stating that “[t]he best case for recognizing a strong association right in *Dale* is to think of the Boy Scouts as an association of parents and their children, one that involves the participation of other adults to promote its purposes,” but relying primarily on the First Amendment to support that claim).

in upholding a state law prohibiting children from distributing religious literature on street corners, even when the child in question did so with her guardian's permission.¹²⁸ The traditional focus on home and school in considerations of parents' rights has led some judges to limit parental authority to those spaces. This limitation may be due to the fact that analyses of parental rights often consider the parents' individual rights only. For example, in rejecting parents' challenge to a local curfew law, the D.C. Circuit stated:

[I]nsofar as a parent can be thought to have a fundamental right, as against the state, in the upbringing of his or her children, that right is focused on the [parent's] control of the home and the [parent's] interest in controlling, if he or she wishes, the formal education of children.¹²⁹

A broader, entity-based conception of family privacy supports a different conclusion. For example, a concurring judge in the same D.C. Circuit opinion stated:

[A] parent's stake in the rearing of his or her child surely extends beyond the front door of the family residence and even beyond the school classroom. . . . [P]arents throughout our history . . . have imposed restrictions on their children's dating habits, driving, movie selections, part-time jobs, and places to visit, and . . . have permitted, paid for, and supported their children's activities in sports programs, summer camps, tutorial counseling, college selection, and scores of other such activities, all arising outside of the family residence and school classroom.¹³⁰

The *Dale* holding could similarly be read to indicate that child-rearing will be protected from state intrusion even when it occurs outside of the home. Moreover, *Dale* also could be read as extending that protection to parental surrogates. Privacy follows the *function* of the entity, not its form. Under this interpretation, notions of family privacy and parental authority are expanded to protect outsourced child-rearing in the spaces between home and school. As such, these spaces are enveloped by an extension of the privacy of the home.

¹²⁸ 321 U.S. 158, 167-70 (1944).

¹²⁹ *Hutchins v. District of Columbia*, 188 F.3d 531, 540-41 (D.C. Cir. 1999) (en banc) (plurality opinion).

¹³⁰ *Id.* at 549-50 (Edwards, J., concurring); *see also id.* at 550 ("The [Supreme] Court has *never* limited its definition of parental rights to include only the right to supervise activities that take place literally inside the home or literally inside the classroom. Indeed, such a limitation is implausible.").

B. *Extending School: Considering the State's Interests*

Childrearing between home and school need not be viewed as an extension of the childrearing performed by parents within the home. Another approach is to view childrearing between home and school as an extension of school, confining parental prerogatives (and those of their surrogates) to the privacy of the home. Notions of family privacy are tempered by the state's interest in educating future citizens. If this interest is predominant in the school setting, it also could govern the spaces between home and school.

In the school context, parents still have a right, at home, to impart to their children whatever values they choose. That right does not extend into school, however. Because the state has an interest in educating future citizens, parents must send their children to school,¹³¹ and parents are given no opportunity, beyond electing local school officials, to dictate how public schools teach their children. Those officials—not children's parents—determine issues such as public school curricula and requirements,¹³² student disciplinary pro-

¹³¹ See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); *Prince*, 321 U.S. at 166 (“Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”).

¹³² See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681-83 (1986) (stating that a legitimate objective of public education is “inculcat[ing] fundamental values necessary to the maintenance of a democratic political system” (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979))); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (“Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally ‘committed to the control of state and local authorities.’” (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975))); *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (stating that parents' right to direct the upbringing of their children does not include “the right to tell public schools what to teach or what not to teach” their children); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996) (holding that a high school may require community service despite parents' objections); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (same); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-41 (1st Cir. 1995) (holding that parents have no right to control or modify sex education curriculum that emphasizes sexual pleasure).

The state's role in determining school curricula and requirements extends to determining which students are eligible for school sports. See *Kite v. Marshall*, 661 F.2d 1027, 1028, 1029 (Former 5th Cir. Nov. 1981) (upholding a rule that prohibited high school students from participating in varsity sports if they attended certain summer

cedures,¹³³ and teacher hiring policies.¹³⁴ Parents generally may opt out of these requirements only by choosing to send their children to private schools or by establishing a school in their own home—and by bearing the cost of either choice.¹³⁵ But even parents who choose to send their children to nonpublic schools are subject to some state regulation in order to further the state’s interest in educating future citizens. For instance, states may seek to enforce minimum educational standards.¹³⁶ Parents also may not invoke their parental rights to escape the effect of antidiscrimination laws to which schools, both public and private, are subject.¹³⁷ Instead, the state’s interest in regu-

training camps on the ground that parents did not have “a fundamental right to send their children to summer athletic camps,” and children did not have “a constitutional right to attend” such camps). *But see* *Laurenzo v. Miss. High Sch. Activities Ass’n*, 662 F.2d 1117, 1119-20 (5th Cir. Unit A Dec. 1981) (recognizing that a school rule requiring students to live with the parent to whom legal custody had been granted or face a one-year suspension from interscholastic competition could infringe on “the right of the family to determine living arrangements,” but dismissing the case as moot).

¹³³ *See* *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (“[T]he concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary . . .”).

¹³⁴ *See* *Blau*, 401 F.3d at 395-96 (stating that various aspects of public school, including “the individuals hired to teach at the school” are “committed to the control of state and local authorities” (quoting *Goss*, 419 U.S. at 578)). Public schools, like private schools, are also subject to Title VII. *See infra* text accompanying note 143; *see also* *Ponton v. Newport News Sch. Bd.*, 632 F. Supp. 1056, 1064 (E.D. Va. 1986) (“The School Board and its employees clearly qualify as ‘employers’ within the meaning of [Title VII].”).

¹³⁵ *Pierce v. Soc’y of Sisters*, 268, U.S., 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”); *see also* *Blau*, 401 F.3d at 395 (recognizing that parents do “have a fundamental right to decide *whether* to send their child to a public school,” but also noting that “they do not have a fundamental right generally to direct *how* a public school teaches their child”); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (“[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.”).

¹³⁶ *Yoder*, 406 U.S. at 239 (White, J., concurring) (“[*Pierce*] lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . .”).

¹³⁷ *See, e.g.,* *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973) (rejecting the claim that parental rights would be violated if the state refused to loan textbooks to all-white private schools, and holding that, although parents have a right to send their children to private schools, and although states have a “special interest in elevating the quality of education in both public and private schools,” states are not required to “grant aid to private schools without regard to constitutionally mandated standards forbidding

lating discrimination, and in instilling the value of nondiscrimination, trumps any parental interest in using schools to practice the virtues of discrimination.

For example, in *Runyon v. McCrary*,¹³⁸ a Supreme Court case decided in 1976, parents with children attending all-white private schools argued that their parental right to teach the value of segregation would be violated if the schools were forced, pursuant to 42 U.S.C. § 1981, to admit African-American students. The Court recognized that the parents, under the First and Fourteenth Amendments, had a constitutional right to impart to their children whatever values and standards they deemed desirable, including the value of segregation.¹³⁹ The Court concluded, however, that the parents' rights would not be violated if the schools were required to admit African-American students, because "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."¹⁴⁰ In other words, the Court found that the mere presence of African-American students would not prevent the parents or the school from teaching that segregation is desirable.

Returning to *Dale*, if the Boy Scouts is analogized to a private school, instead of to a parent, then *Runyon* suggests that the Boy Scouts cannot exclude Dale simply by invoking a desire to teach by example. Just as the schools in *Runyon* were not exempt from § 1981, the Boy Scouts would not be exempt from New Jersey's public accommodations law. Moreover, application of the New Jersey law would not automatically, or even necessarily, change the subject mat-

state-supported discrimination"); see also *infra* notes 138-143 and accompanying text (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976), and Title VII).

¹³⁸ 427 U.S. 160 (1976).

¹³⁹ *Id.* at 176-77.

¹⁴⁰ *Id.* at 176 (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)). Accordingly, the *Runyon* Court rejected the parents' First Amendment argument by drawing a distinction between speech and conduct. See *id.* ("[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." (first emphasis added)). Some commentators have suggested that the *Dale* Court implicitly overruled this aspect of *Runyon* by holding that Dale's mere presence would hinder the Boy Scouts's message. See, e.g., Hunter, *supra* note 74, at 1603 ("The *Dale* majority simply ignores *Runyon*"). However, such an interpretation also could mean that *Dale* overruled *Jaycees*, unless private schools are seen as fundamentally different from other private associations.

ter of the Boy Scouts's teaching. Rather, the Boy Scouts could continue to espouse its views on sexuality despite Dale's presence, particularly if, as indicated in the record, none of Dale's troop members knew that he was gay.¹⁴¹ Additionally, even if the troop members knew about Dale's sexuality, that facet of his identity would not prevent Dale from conforming his teachings to those desired by the Boy Scouts or, similar to the holding in *Runyon*, prevent the Boy Scouts from otherwise conveying its desired message to the boys under its care.

Analogizing the Boy Scouts to a private school in this manner is tempting because the Boy Scouts's activities are similar to school activities. In both instances, children of approximately the same age, and with different parents, come together to learn as a group. *Runyon* does not serve as a perfect analogy, however, because James Dale was not seeking to be a youth member of the Boy Scouts. Rather, Dale was seeking re-admittance as a troop leader, making him more like a teacher at a private school than a student.

Acknowledging Dale's teacher-like role does not change the fact that schools are subject to antidiscrimination laws. Private schools may require their teachers to serve as role models, mandating that their behavior not conflict with the lessons the school is trying to teach.¹⁴² As such, private schools that ask students to remain abstinent until marriage may fire teachers who become pregnant out of wedlock. However, as *Runyon* indicates, schools may not do so if termination would violate state or federal antidiscrimination laws. For example, because Title VII prohibits discrimination on the basis of sex, such schools may dismiss unwed pregnant teachers only if they also fire male teachers who become fathers out of wedlock.¹⁴³ In *Dale*, this

¹⁴¹ See *supra* text accompanying notes 84-85.

¹⁴² See Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 853 (1987) ("[A] parochial school cannot convey its religious message[] if it is required to allow teachers to discuss the pros and cons of abortion or birth control.").

¹⁴³ See, e.g., *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 414 (6th Cir. 1996) ("Although Title VII requires that this code of conduct be applied equally to both sexes, defendant presented uncontroverted evidence at trial that [the president of the school] had terminated at least four individuals, both male and female, who had engaged in extramarital sexual relationships . . ." (citation omitted)); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 349 (E.D.N.Y. 1998) ("[R]estrictions on sexual activity, applied equally to males and females, are not discriminatory."); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 806-07 (N.D. Cal. 1992) (holding that religious employers may discriminate on the basis of religion, but not sex); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 n.5 (N.D. Iowa 1980) ("For example, if single male teachers at [the high school], known to have engaged in pre-marital sex, were equally dis-

approach would mean that the Boy Scouts could not exclude Dale simply because he self-identified as a gay man, because New Jersey's public accommodations law prohibits discrimination on the basis of sexual orientation. Rather, if the Boy Scouts wished to exclude Dale, it would be required to investigate the sexual conduct of all of its troop leaders and show how particular sexual behavior conflicted with the lessons it attempts to impart.

Of course, the above analysis depends on the Boy Scouts being analogized to a school, instead of to a parental surrogate. *Runyon* is instructive, however, even if the Boy Scouts is viewed as a parental surrogate. *Runyon* emphasizes that parents do not have complete control over the rearing of their children; rather, parents must heed state mandates when their children are at school, even when their children attend private schools. If parents are subject to such restrictions, then certainly parental surrogates, like the Boy Scouts, could be similarly constrained. Therefore, the Boy Scouts could be subject to New Jersey's public accommodations law.

An interesting counterpoint to *Runyon* and *Dale* can be found in the example of home schooling. In contrast to *Dale*, in which a family function traditionally performed in the home could be seen as moving outside of the home, home schooling involves a function normally performed outside of the home being moved inside. If parents have complete control over childrearing within the home, then the state's regulation of education should stop at the home's front door. Yet this is not the case. The state follows education into the home despite notions of family privacy and parents' rights to direct the upbringing of their children.¹⁴⁴

Parental authority thus is not spatially determined, but instead is based on the type of childrearing being performed. If the childrearing is more in the nature of educating children to become informed

charged[.] any inference of sexual discrimination otherwise shown might be dissipated.”). For an argument that such cases were wrongly decided, and that private schools should be shielded from antidiscrimination laws when hiring and firing teachers, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1577 (2001).

¹⁴⁴ States may regulate home schooling by mandating, *inter alia*, the minimum qualifications of the instructor, the curriculum, the number of days of instruction, the standardized tests that must be administered, and parental reporting obligations. See, e.g., *Blackwelder v. Safnauer*, 689 F. Supp. 106, 128-37 (N.D.N.Y. 1988) (upholding state regulation of home schooling against parents' free exercise and privacy challenges); HARRIS & TEITELBAUM, *supra* note 13, at 76 (discussing the wide variation of home schooling regulation by and among the states).

future citizens, then the state will enter the home and impose standards that may conflict with parental desires.¹⁴⁵ Yet, in moving from the public to the private sphere, the state becomes less prescriptive and more deferential to parental prerogatives. Indeed, the state increasingly defers to parents as education moves from public schools to private schools to the home. Likewise, when the childrearing traditionally performed within the home moves to organizations outside of the home, it is conceivable that the privacy accorded to such childrearing should gradually give way to state interests.

The case that has given the most deference to parental authority to date, *Wisconsin v. Yoder*,¹⁴⁶ could be read to support such an approach. In that case, the Supreme Court held that Amish parents could remove their children from school after the eighth grade to protect them from worldly values, despite compulsory education laws mandating school attendance until the age of sixteen.¹⁴⁷ The Court's decision depended on unique elements of the Amish faith, particularly its emphasis on living a simple life grounded in farming and its ethic of helping its members during times of trouble, instead of resorting to the support of the state.¹⁴⁸ Indeed, the Court emphasized that its holding was not grounded solely in its respect for secular parental prerogatives: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations"¹⁴⁹ Instead, the Court respected parental authority because it was necessary to maintain a religion outside of mainstream society and to equip children to live within that religion. No one suggested that the Amish could seek to achieve their parental goals by policing what happens at schools or at other sites in the public realm.¹⁵⁰

¹⁴⁵ One commentator has relied on this distinction between types of childrearing to explain the different outcomes in *Dale* and *Runyon*. See Karen Lim, Note, *Freedom to Exclude After Boy Scouts of America v. Dale: Do Private Schools Have a Right To Discriminate Against Homosexual Teachers?*, 71 FORDHAM L. REV. 2599, 2639 (2003) ("Simply stated, *Runyon* involved the state's interest in liberal education and *Dale* did not. . . . The work of schools lies at the core of a state's interest in education; the activity of the Boy Scouts is peripheral.").

¹⁴⁶ 406 U.S. 205 (1972).

¹⁴⁷ *Id.* at 234-36.

¹⁴⁸ *Id.* at 209-13, 216-19.

¹⁴⁹ *Id.* at 215.

¹⁵⁰ And indeed, attempts by non-Amish parents to do so have been rejected. See, e.g., *Duro v. Dist. Attorney*, 712 F.2d 96, 98-99 (4th Cir. 1983); *Davis v. Page*, 385 F. Supp. 395, 400-05 (D.N.H. 1974).

Applying this analysis to the Boy Scouts would mean, at the very least, that the Boy Scouts should not be permitted to operate completely outside the zone of state power. Rather, as an entity functioning between home and school, the Boy Scouts should be subject to some state-imposed limitations. Such an approach could ultimately support outcomes that are quite different from the majority's holding in *Dale*.

III. EMBRACING THE SPACES OF CHILDHOOD WITHIN FAMILY LAW

Analogizing childrearing that takes place between home and school to the childrearing that takes place at either home or school may help make sense of the holding in *Dale*, but it also may provide a foundation for an alternative holding. These conflicting outcomes indicate that analogies to home or school will rarely be dispositive. They do, however, provide a useful vehicle for examining existing approaches to childrearing within family law, and exploring how those approaches might be extended to childrearing that takes place between home and school. The analogies also highlight the limits of the existing scope of family law, namely its failure to recognize that the spaces between home and school may be distinct from both home and school, rendering analogies to either concept ultimately inapposite.

This Part calls for a theory that acknowledges childrearing between home and school for what it is, as opposed to how it is similar to the childrearing that takes place at either home or school. The first Section situates the call for such a theory in relation to existing attempts within family law to reflect more accurately the reality of family life. The next Section explores the necessity of such a theory by discussing several factual scenarios that the theory could address. Finally, the last Section explores potential contours and implications of the theory.

A. *Extending the Functional Approach*

Recognizing the distinct reality of childrearing that takes place between home and school would be consistent with recent family law reforms designed to acknowledge the diverse reality of family life. Several states now permit same-sex couples to be considered legal families for all or some purposes,¹⁵¹ and stepchildren and other “de facto”

¹⁵¹ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (recognizing same-sex marriage); CAL. FAM. CODE § 297.5 (West Supp. 2006) (extend-

children are increasingly recognized as legal family members, even in the absence of adoption or biological ties.¹⁵² These new legal approaches to the family encompass more of the ways people actually live their lives. Many people who consider themselves to be family, but who traditionally have not enjoyed the legal status of family, now are entitled to legal benefits and protections either because they satisfy a functional test¹⁵³ or, more commonly, because they fall within expanded definitions of legally recognized families.¹⁵⁴

These changes in family law are the result, in large part, of legal scholarship that questioned why legal acknowledgement remained limited to the traditional nuclear family when various other associations function in very similar ways. For example, Martha Minow has argued that groups of people who socialize their members and provide each other both life necessities and emotional security should be considered families for many purposes.¹⁵⁵ Likewise, Barbara Bennett

ing family recognition to registered domestic partners); CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2006) (extending family recognition to couples in registered civil unions); HAW. REV. STAT. § 572C-1 (Supp. 2005) (extending family recognition to registered reciprocal beneficiaries); ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A), (17), (20) (2005) (extending family recognition with respect to inheritance rights to registered domestic partners); N.J. STAT. ANN. § 26:8A (West Supp. 2006) (extending partial family recognition to registered domestic partners); VT. STAT. ANN. tit. 15, § 1204 (2002) (extending family recognition to couples in registered civil unions); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (holding that same-sex couples are entitled to all of the state benefits that heterosexual married couples enjoy).

¹⁵² See generally John DeWitt Gregory, *Defining the Family in the Millennium: The Troxel Follies*, 32 U. MEM. L. REV. 687, 689-712 (2002) (describing cases and statutes extending some childrearing rights to grandparents, stepparents, foster parents, co-parents, and de facto parents); *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2052-64 (2003) (same); see also ALLI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03, at 107-08, 118-24 (2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION] (proposing increased legal recognition of de facto parents).

¹⁵³ See, e.g., *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-55 (N.Y. 1989) (using a functional analysis to define cohabiting same-sex partners as “family” for the purposes of New York’s rent-control laws). But see *Allison D. v. Virginia M.*, 572 N.E.2d 27, 29-30 (N.Y. 1991) (refusing to recognize a biological mother’s former same-sex partner as a de facto parent for visitation purposes); *In re Estate of Cooper*, 187 A.D.2d 128, 131-32 (N.Y. App. Div. 1993) (denying testator’s former same-sex partner the right to an elective share of testator’s estate because he did not qualify as a “husband” or “wife”).

¹⁵⁴ As such, status is still privileged over function, but legal status sometimes includes more of the ways that people live as families. See *supra* notes 151-152 and accompanying text. Of course, many people still are excluded from the definition of family in many states.

¹⁵⁵ See Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owning*, 95 W. VA. L. REV. 275, 287-88 (1992-1993) [hereinafter Minow, *All in the Family*];

Woodhouse has argued that family law should recognize groups that nurture and support their household members, even if those in the support unit do not fit the traditional nuclear family form.¹⁵⁶ Such scholarship,¹⁵⁷ and the reforms following it, view the proper role of family law as reflecting and supporting individuals' choices about the people with whom they share their lives.

This functional approach to the family need not stop at family personnel. If a goal of family law is to support families according to the realities of contemporary family life, then family law scholars and reformers must consider not only family composition, but also *how*—and *where*—family functions are performed. Such considerations have been largely absent from recent scholarship and reform proposals.¹⁵⁸ Instead, the new families increasingly recognized by the law tend to function very much like the traditional nuclear family, just with different personnel.¹⁵⁹ New people perform the same functions that have

Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270-72 (1991).

¹⁵⁶ See Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 576-84; Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 279-80 (1990) (book review) (suggesting that the critical inquiry is "not whether the family form look[s] like a family, but whether it act[s] like one").

¹⁵⁷ For other examples, see Bartlett, *supra* note 11, at 944-51 (proposing "[t]he concept of nonexclusive parenthood" in order to "permit[] recognition of de facto parenting relationships without severing the child's relationships with natural or legal parents"); Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1309-20 (2005) (setting out a "redefinition of fatherhood around nurture"); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990) (concluding that "courts should redefine parenthood to include anyone in a functional parental relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist").

¹⁵⁸ This has not always been the case. Most notably, in the 1960s and 1970s, family law scholars and activists responded to the gradual acceptance of gender equality by arguing that the law should no longer allocate spousal functions along gender lines. Legislatures and courts responded relatively quickly by eliminating official gender roles within the family. See MCCLAIN, *supra* note 5, at 60-61 (tracing the progress, since the 1960s, of judicial and legislative efforts to eradicate laws treating men and women differently based on "the patriarchal model of family governance"); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 110-14 (2005) (describing the erosion of official gender roles in American family law over the past thirty years).

¹⁵⁹ For an excellent critique of this development, and of relying on function to expand definitions of the family in general, see Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 319-23 (2004). Hamilton's critique is limited, however, to the desirability of using functional tests to determine changing family

been legally recognized in the past. Adults in these families tend to be sexually involved with each other, much like they would be under traditional definitions of marriage, and the children are often blood relations of at least one of the adults.¹⁶⁰ Moreover, these new families are recognized as functioning almost entirely in what continues to be considered a private realm, the sphere to which law has relegated most of family life. In other words, the identities of family members may have changed, but the functions of family recognized by the law have, for the most part, remained static.

New approaches to the “who” of family thus risk reinforcing existing notions of the “how” of family. Such reinforcement would coincide with the goals of family law scholars and reformers only if existing family law adequately reflected and supported the ways that families actually function. That may be the case with respect to some aspects of adult familial relationships,¹⁶¹ but it seems much less likely with respect to parent-child interactions.

As discussed in Part I above, childrearing has never been confined to the home, even when children are not at school; rather, multiple actors have long engaged in childrearing in the spaces between home

personnel. She, like other family scholars, does not explicitly consider how such tests also could respond to other ways in which families have changed.

¹⁶⁰ See David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 794 (2002) (noting that, in the context of constitutional rights such as privacy, new definitions of family have not embraced “more novel intimate configurations”). For example, when the American Law Institute proposed that its model family dissolution default rules be extended to all domestic partnerships, it defined such partnerships as those that function like marriage. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 152, § 6.03, at 916-19.

¹⁶¹ Though many changes have occurred with respect to dating patterns, acceptance of same-sex relationships, and the age of commitment, once adults decide to commit to long-term relationships, those relationships tend to be sexual relationships performed in the private realm, much like in the past. It seems that few adult couples in sexual relationships attempt to engage in sexual relations in the public realm (although they may want to), and that few adult couples live together solely on platonic terms. But such choices may be the product of the law’s failure to recognize, or support, such activities. Cf. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 136 (1993) (describing the channeling function of family law by emphasizing how “law may shape behavior in complex ways through its affirmation or condemnation of various types of conduct”); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) (same). For a discussion of proposals to expand family definitions to include platonic domestic arrangements, see Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203-09, 218-25 (2003) (discussing, *inter alia*, the Canadian approach as outlined in LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), available at <http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/beyond-conjugality-e/pdf/37152-e.pdf>).

and school.¹⁶² Moreover, given middle-class women's increasing participation in the paid work force, and the greater demands of work in general, childrearing has been increasingly outsourced to various actors in these spaces.¹⁶³ Recent changes in family life thus involve not only changes to the composition of family, but also changes in how, and where, some families perform their childrearing functions. The existing functional approach to the family has yet to consider these facts. Family law's silence in this area risks reinforcing erroneous notions that childrearing is performed solely by parents or the state, at home or at school.

Such silence does more than create inaccurate impressions; it also can shape aspects of family life by specifying which childrearing activities are worthy of legal protections—through either regulation or explicit nonregulation¹⁶⁴—and which are not. Family law's current focus on home and school most likely contributes to the salience of those sites for parents and children. In particular, because parental rights are perceived to be most protected when childrearing takes place in the home, family law scholars must acknowledge that their silence about childrearing between home and school could contribute to the privatization of family life, by reinforcing the perception that child-

¹⁶² See, e.g., CREMIN, *supra* note 31, at 298-302 (discussing the rise of “formal and informal day nurseries,” beginning in the 1870s, which addressed the needs of both single-parent families and families where both parents worked outside of the home).

¹⁶³ The federal government acknowledged this fact when it passed the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000), which mandates only twelve weeks of unpaid work leave after the birth or adoption of a child. *Id.* § 2612(a)(1)(A); see also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-40 (2003) (detailing the history, mechanics, and rationale of the Family and Medical Leave Act). Presumably, most workers return to work after this leave, but the demands of childrearing will remain, necessitating that childrearing be performed by actors outside of the family unit. In addition, the federal government has, in one context, mandated the outsourcing of childrearing by requiring mothers who receive public assistance to work outside of the home. See, e.g., Dorothy Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1041-57 (2004) (noting the surge in demand for childcare after the passage of work requirements for public assistance recipients and the pressure placed on recipients to value employment over childcare).

¹⁶⁴ JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 352 (1994) (“[T]he private and even the intimate ‘spheres’ have always been constituted and regulated by law, even if what is constituted includes a domain of autonomous judgment that can come into conflict with law.”); Minow, *supra* note 119, at 7-8 n.15 (stating that the state’s “noninvolvement in family matters expresses its approval, or at least its lack of disapproval, of what goes on in the private realm”).

rearing is a purely private activity and perhaps even encouraging some parents to keep children at home.¹⁶⁵

Analyzing the spaces between home and school thus can illuminate how people function both outside and within the spaces of home and school, and why they might do so. Considering these spaces also can reveal much about the law's role in constructing the poles that define them: the poles of home and school. Investigations of what makes the space *between* home and school different from either home or school may lead to clarification of what is at stake in both the home and the school spaces. As such, explicitly considering this previously neglected space can shed light on what lies beneath the legal construction of childrearing authority within the home and at school.

What would it mean to expand the existing functional approach to the family by exploring how family law views, and should view, childrearing that takes place outside of the traditional contexts of home and school, by actors who are neither parents nor teachers? As previously discussed, when childrearing is performed by parents in the home, it is often enveloped by common law and constitutional notions of privacy. What happens to that privacy when childrearing is outsourced? Does privacy attach to the childrearing function and travel outside of the home? Or does privacy stay within the home, attaching to childrearing only to the extent it is performed within the private, domestic sphere? If the latter is true, may the state intervene and regulate the childrearing function, much as it does in schools? Or should the spaces between home and school be analogized to neither home nor school, and be viewed instead as distinct spaces requiring more tailored legal approaches?

¹⁶⁵ Cf. Judith Warner, *Loosen the Apron Strings*, N.Y. TIMES, July 20, 2006, at A21 (discussing how many parents are not sending their children to summer camps because they want their children at home, and how "some parents even question whether those who send their children away for extended camps 'really love their kids'"). In addition, the law's focus on the privacy of the home could encourage those parents who can afford it to hire nannies and housekeepers to take care of their children, instead of relying on caregivers outside of the home. Although such actors are generally presumed not to provide the same type of care as parents, their operation within the home means that parents can dictate their childrearing practices free from state intervention. See *supra* text accompanying notes 124-126. Accordingly, the care provided by nannies and housekeepers is outside the scope of this Article's focus on childrearing *between* home and school.

B. *Current Controversies Between Home and School*

Thinking about childrearing that occurs between home and school is more than an academic exercise. Parents have increasingly sought to exert control over activities that take place in these contested spaces. Because no settled doctrine governs such claims, the results are often inconsistent. Exploring these inconsistencies can highlight what is at stake in the spaces between home and school and can help explain the ways in which analogies to home and school often fail to consider all pertinent interests.

Many attempts to extend parental authority beyond the home suggest a vision of parenting and childrearing that hinges on control of one's child, regardless of location. Parents seek to control the messages to which their children are exposed in the spaces between home and the classroom, as well as to control their children's very presence in those spaces. Such control has been valued as a way to foster diversity and pluralism; children are "not the mere creature of the state," but also are influenced by their parents, who reflect the pluralistic nature of our society.¹⁶⁶ In addition, many commentators have defended broad notions of parental control by arguing that those with the greatest stake and investment in a child should oversee the child's development.¹⁶⁷ To permit the state, or others,¹⁶⁸ to intervene in the par-

¹⁶⁶ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); see also Buss, *supra* note 3, at 32 (stating that parents' "developmental competence" should be favored over the state's competence "in the interest of pluralism and experimentation"); Davis, *supra* note 110, at 1371 (arguing that parents must be given the right to "embrace, act upon, and advocate privately chosen values").

¹⁶⁷ For examples of this argument, see Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 284-90; John E. Coons, *Intellectual Liberty and the Schools*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 495, 505-10 (1985); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940-41 (1996); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1077-79 (2003); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995).

¹⁶⁸ These arguments favoring parental control also are made with respect to limiting the rights of third parties, such as grandparents, to intervene in the parent-child relationship. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 70 (2000) ("[T]he decision whether . . . an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance."); Buss, *supra* note 167, at 284-90 (exploring the appropriate degree of deference to parental decisions); Scott, *Parental Autonomy*, *supra* note 167, at 1097-98 (discussing the potential negative effects on parents and children that could be caused by "the legal recognition of third party custody and visitation claims"). But see Bartlett, *supra* note 11, at 961-63 (arguing that the state should recognize multiple parents when a child has developed child-parent relationships outside of the traditional nuclear family); Meyer, *supra* note 2, at 586-87 (arguing

ent-child relationship would decrease incentives for parents to invest in their children, thereby reducing family intimacy¹⁶⁹ and shifting childrearing responsibility away from those who are considered to be most competent to raise the child, because of daily interaction and the knowledge and emotional connections that flow from that interaction.¹⁷⁰

These justifications for parental control have traditionally been deployed to argue against state interference in the family. Families are a site of diversity and pluralism largely because they are permitted to operate outside of the zone of state power;¹⁷¹ hence, the state cannot “standardize its children.”¹⁷² Implicit in such arguments is the assumption that families function primarily in the private realm of the home. If this were not the case, families could be exposed to the taint of state power.

Recent attempts to extend parental authority outside of the home challenge this assumption, demanding that parental control over children be protected even in the public realm.¹⁷³ Pursuant to this view, family privacy is not limited to the home but rather attaches to the childrearing function, even when that function is performed outside of the home or is performed by parental surrogates. Family law’s neglect of the spaces between home and school could be interpreted as supporting such a view. Indeed, such neglect could be the natural product of a normative view that all nonstate childrearing should be

that some of parents’ decision-making authority should give way to the state’s interest in maintaining children’s ongoing relationships with extended family members).

¹⁶⁹ See, e.g., Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 17 (1980) (“[R]egulation transforms relationships into less intimate ones.”).

¹⁷⁰ See, e.g., Emily Buss, Essay, “Parental” Rights, 88 VA. L. REV. 635, 647 (2002) (advocating deference to parental decisions because parents are “the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances”).

¹⁷¹ See *supra* text accompanying notes 117-126.

¹⁷² *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

¹⁷³ Some parents have even gone so far as to argue that their childrearing authority entitles them to control the curriculum of public schools. For the most part, however, these claims have been unsuccessful. See *supra* note 132 (listing cases where parents’ views were not permitted to trump the views of school officials); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15-18 (2004) (rejecting a noncustodial parent’s challenge to the content of the Pledge of Allegiance, which was recited at his daughter’s school, because the parent’s custodial status rendered him without standing to assert the claim). This Article focuses solely on parental attempts to extend their authority in the spaces *between* home and school—areas where relatively little law currently exists.

subsumed within the sphere of family privacy—controlled by private ordering and unregulated by the state.

Despite strong arguments in favor of parental control in general, family law scholars have not articulated a rationale for extending that control outside of the home and into public realms short of the schoolhouse door. Moreover, courts have been largely unsympathetic to parents' claims that state regulation of various spaces between home and school interferes with their right to rear their children. Instead, as discussed in more detail below,¹⁷⁴ courts have in fact permitted the state to regulate many of the spaces between home and school. These situations thus provide insight into the current limits of parental power, challenging the view that family law scholars have been silent about childrearing between home and school because it is obvious that parents should control such childrearing.

In some situations, it is not surprising that courts have permitted states to limit parental prerogatives, because parents have sought to extend their authority to realms long considered to be part of the state's domain.¹⁷⁵ For example, nudist parents in Texas invoked *Dale* to argue that a local law permitting adults to sunbathe nude in a county park, but excluding all children from the park, interfered with their right to teach their children the values of the nudist, or "naturist," lifestyle.¹⁷⁶ The state court disagreed, emphasizing that the state has an interest in regulating all activity, including childrearing activity, that occurs on state land. The court concluded that the law at issue constituted a permissible regulation, because "[t]he rules do not affect the ability of . . . naturist parents to associate with their children, but regulate only *where* such associations may occur."¹⁷⁷ The court also distinguished *Dale* by emphasizing the different manner of childrearing employed by the nudists:

While appellants and the Boy Scouts may share a common goal to instill values in children, the manner in which these values are transmitted is distinguishable. The Boy Scouts, as an organization, seeks to transfer its

¹⁷⁴ See *infra* notes 176-192 and accompanying text.

¹⁷⁵ These cases are thus analogous to cases where parents have unsuccessfully sought to control public school curricula. See *supra* notes 132, 173.

¹⁷⁶ Cent. Tex. Nudists v. County of Travis, No. 03-00-00024-CV, 2000 WL 1784344, at *1 (Tex. Ct. App. Dec. 7, 2000).

¹⁷⁷ *Id.* at *4 (emphasis added). The court analogized this case to *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), in which the U.S. Supreme Court upheld an ordinance barring minors from certain dance halls; the court also cited *Runyon* as support for the assertion that parental rights are not absolute, but rather are subject to some regulation. Cent. Tex. Nudists, 2000 WL 1784344, at *3-4.

values to its members by “having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing.” In contrast, appellants seek to convey their values to their children by engaging in swimming, sunbathing, and other forms of recreation in the nude at McGregor Park. Of critical importance to appellants is not the activity itself, but rather, the manner in which the activity is conducted—in the nude and in public.¹⁷⁸

Other attempts to extend parental authority beyond the home present closer questions, yet courts still have upheld state regulations limiting parental authority in such cases. Most notably, parents have been largely unsuccessful in challenging local curfew ordinances, even though such ordinances can substitute the views of the state for parents’ own views of when and where their children should be able to travel. These decisions seem to be motivated by the state’s interests in protecting the safety of children, making the curfew laws similar to other state involvement that occurs upon family default. In particular, courts seem to question why parents would permit their children to leave the home at night. As one court has stated, parents’ right to direct the upbringing of their children “does not extend to . . . unilaterally determin[ing] when and if children will be on the streets—certainly at night. That is not among the ‘intimate family decisions’ encompassed by such a right.”¹⁷⁹ In the end, however, such holdings may not reveal much about the scope of parental power, because most

¹⁷⁸ *Cent. Tex. Nudists*, 2000 WL 1784344, at *5 (citation omitted) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000)). A similar rationale would likely apply to attempts by parents to exert control over childrearing in other public spaces, such as municipal swimming pools or public libraries.

¹⁷⁹ *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (plurality opinion) (quoting and discussing *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998), which stated that “[t]he Charlottesville ordinance, prohibiting young children from remaining unaccompanied on the streets late at night, simply does not implicate the kinds of intimate family decisions considered in the above cases”). But Chief Judge Edwards, concurring in *Hutchins*, resisted the comparison to state involvement upon family default, emphasizing that

when the Government does intervene in the rearing of children without regard to parents’ preferences, “it is usually in response to some significant breakdown within the family unit or in the complete absence of parental caretaking,” or to enforce a norm that is critical to the health, safety, or welfare of minors. The difficult question, then, is how to accommodate both the state’s interests and parents’ rights where there has been no specific finding of a breakdown within an identified family unit and there is no indisputable threat to the health, safety, or welfare of minors.

Id. at 550-51 (Edwards, C.J., concurring) (citation omitted) (quoting *Action for Children’s Television v. FCC*, 58 F.3d 654, 679 (D.C. Cir. 1995) (Edwards, C.J., dissenting)).

curfew ordinances have been upheld on the theory that their restrictions coincide with the presumed intent of most parents and contain adequate exceptions to accommodate parental wishes.¹⁸⁰ Indeed, curfew laws have been struck down as a violation of parental rights only when they were extremely broad and contained limited exceptions.¹⁸¹

Another case, *White Tail Park, Inc. v. Stroube*,¹⁸² seems much more at odds with notions of parental authority, particularly the type of deference to parental prerogatives that could be seen as underlying the holding in *Dale*. In 2004, the state of Virginia amended its summer camp licensing law. The amendment requires the state department of health to deny any license application made by a “nudist camp for juveniles,” which is defined to be any camp where juveniles attend openly in the nude and are not accompanied by a parent, grandparent, or guardian.¹⁸³ As recounted in subsequent litigation, the amendment was passed after a nudist organization operated a week-long juvenile nudist camp at a private nudist campground in the state in 2003. The camp offered traditional summer camp activities, along with “an educational component designed to teach the values associated with social nudism through topics such as ‘Nudity and the Law,’ ‘Overcoming the Clothing Experience,’ ‘Puberty Rights Versus Puberty Wrongs,’ and ‘Nudism and Faith.’”¹⁸⁴ Seeking to operate a similar camp in 2004, but facing the new amendment, the organization, the campground, and three sets of parents sued the state department

¹⁸⁰ Indeed, in *Hutchins*, the majority found that the D.C. curfew was constitutional because the ordinance reinforced parental authority; no restrictions were imposed on juveniles’ activities if the minors were accompanied by a parent or by an adult authorized by the parent. *Hutchins*, 188 F.3d at 545. Moreover, parents could allow their children to run errands during curfew hours, and juveniles could attend official school, religious, or other civic activities. See *id.* (analogizing to *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), where a state regulation prohibiting the sale of pornographic magazines to minors contained an exception that permitted parents to buy the magazines for their children); see also *Qutb v. Strauss*, 11 F.3d 488, 493-95 (5th Cir. 1993) (finding a youth curfew constitutional because it was narrowly tailored).

¹⁸¹ See *Nunez v. City of San Diego*, 114 F.3d 935, 946-49 (9th Cir. 1997) (finding a youth curfew unconstitutional because “it does not provide exceptions for many legitimate activities, with or without parental permission”); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1071-74 (5th Cir. Unit A Oct. 1981) (striking a curfew with no exemption for school activities, religious meetings, entertainment events, or athletic pursuits); *State v. J.P.*, 907 So. 2d 1101, 1117-19 (Fla. 2004) (holding that a curfew ordinance was unconstitutional because it made minors’ conduct illegal even when they had the permission of their parents to be on the streets after curfew hours).

¹⁸² 413 F.3d 451 (4th Cir. 2005).

¹⁸³ VA. CODE ANN. § 35.1-18 (2005).

¹⁸⁴ *White Tail*, 413 F.3d at 455.

of health, challenging the validity of the amendment. Specifically, the complaint asserted that the amendment violated the “plaintiffs’ right to privacy and to control the education and rearing of their children under the Fourteenth Amendment; and . . . [their] First Amendment right to free association.”¹⁸⁵

As such, *White Tail* is like *Dale*, but with the family privacy claims explicitly alleged. The plaintiffs have not challenged the general licensing of summer camps, which can be justified on public health and safety grounds. Rather, the plaintiffs have objected to the state’s interference with the nudist camp’s operations. It is hardly controversial that one of the primary purposes of any summer camp is to provide children with an escape from their parents (and vice versa) during the summer.¹⁸⁶ To deny this opportunity to nudists who wish to communicate the values—and practices—of nudism to children on private land seems to interfere with the rights of parents and parental surrogates to engage in the childrearing of their choice.

It is unclear, however, whether courts will afford the nudist organization and parents the same deference that was afforded to the Boy Scouts, even though both cases involve attempts to instill values in young people. The federal district court denied the plaintiffs a preliminary injunction and dismissed the case as moot after the nudist organization cancelled the 2004 camp.¹⁸⁷ The Fourth Circuit reversed in part, holding that the claims brought by the nudist organization and the nudist campground were not moot,¹⁸⁸ but that only the nudist organization, and not the campground, had standing.¹⁸⁹ Both the organization and the campground had “asserted injuries to the organizations themselves,”¹⁹⁰ but only the organization provided evidence showing how the amendment would harm its interests in educating

¹⁸⁵ *Id.* at 456.

¹⁸⁶ Indeed, one of the sets of parents in *White Tail* explained that they challenged the amended statute because they believed the nudist camp “experience would be more valuable if [the children] were able to spend the week away from us.” *Id.* at 457-58 (internal quotation marks omitted); see also Warner, *supra* note 165, at A21 (remark- ing that her child was “truly fortunate” to be away from her while at summer camp).

¹⁸⁷ *White Tail*, 413 F.3d at 456.

¹⁸⁸ The Fourth Circuit held that the claims brought by the nudist organization and the nudist campground continued to present a live controversy because the two entities operated the camp in 2003 “with the expectation that it would become an annual event,” and the organization subsequently applied for a permit to hold the camp at the campground in 2005. *Id.* at 457 (internal quotation marks omitted).

¹⁸⁹ *Id.* at 459-62.

¹⁹⁰ *Id.* at 459 (emphasis omitted).

“nudist youth and inculcat[ing] them with the values and traditions that are unique to the culture and history of the . . . American social nudist movement” by reducing the size of the camp.¹⁹¹ The Fourth Circuit upheld the finding of mootness with respect to the parents’ claims, because nothing in the record indicated that the particular plaintiffs intended to enroll their children in the camp in any subsequent summer.¹⁹²

The district court now must consider the merits of the nudist organization’s claims. The holding in *Dale* would seem to suggest that the nudist organization should be permitted to operate largely outside the zone of state power and hence be exempt from the amendment. Indeed, the nudist camp seems to resemble Boy Scout camps throughout the nation. However, the Virginia state legislature passed its amendment well after *Dale* was decided. Virginia clearly believed that it had a legitimate interest in limiting minors’ access to nudist teachings outside of the presence of their parents. The district court very well could conclude that nudity alone is sufficient to distinguish the case from *Dale*, a conclusion that could be supported by precedent where parents were declared unfit, in part because they took their minor children to nudist camps or were otherwise involved with nudist colonies.¹⁹³ Yet nudist practices by themselves have not constituted sufficient parental default to justify state intervention in the home in

¹⁹¹ *Id.* at 461 (internal quotation marks omitted). The court stated that the size of the camp would likely be reduced “because not all would-be campers have parents or guardians who are available to register and attend a week of camp during the summer.” *Id.*

¹⁹² *Id.* at 457-58.

¹⁹³ *See, e.g.*, *Fish v. Fish, Jr.*, 881 A.2d 342, 346-47 (Conn. App. Ct. 2005) (upholding lower court’s denial of custody to father because, in part, he made inappropriate and suggestive comments, “walked around the house in an open bathrobe exposing his genitals in [the child’s] presence and . . . joked about going to a nudist colony with her”); *William S.V., Jr. v. Ann S.V.*, No. CN90-7921, 1991 WL 275151, at *7, *12 (Del. Fam. Ct. Oct. 28, 1991) (identifying the father’s attendance at nudist colonies as a factor in determining the best interests of the child, and ultimately awarding primary custody to the mother, who had previously served as the primary caregiver); *Jankowski v. Jankowski*, No. 258466, 2005 WL 1185611, at *1 (Mich. Ct. App. May 19, 2005) (concluding that an extended family member “would not be an appropriate father figure” for a mother’s children because he was “abusive and belittling,” failed to understand the seriousness of the children’s problems, and took one of the children to a nudist colony several times); *Barr v. Barr*, No. 207014, 1999 WL 33437891, at *1 (Mich. Ct. App. Aug. 13, 1999) (upholding lower court order prohibiting father from taking child to any nudist facility during visitation periods).

other cases.¹⁹⁴ Is nudity sufficient to distinguish *White Tail* from *Dale* and to justify state regulation limiting the authority of parents to control childrearing outside of the home, in private spaces between home and school?

Another Supreme Court decision may provide some guidance, while also highlighting the often inconsistent approach taken in cases involving childrearing disputes outside the traditional scope of family law. In *Ashcroft v. ACLU*, the Court enjoined enforcement of a federal statute designed to protect minors from exposure to sexually explicit material on the Internet because the government failed to show that the statute's approach was superior to alternative means that would infringe less on adults' access to Internet content.¹⁹⁵ Therefore, as was the case in *Dale*, the Court held that state regulation was impermissible. Here, however, the regulation could be viewed as supporting parental authority; groups of parents had enlisted the state to help them limit their children's Internet access. In contrast to *Dale*, the holding in *Ashcroft* refused to defer to the prerogatives of these parents or of their surrogates. Rather, the Court permitted the First Amendment rights of adults, as a general group, to trump the desires of those parents who wished to limit their children's Internet activity.¹⁹⁶ The holding is particularly striking from a family law perspective because the statute was designed, in large part, to help parents control the messages their children receive via the Internet *within the home*.¹⁹⁷ Cyberspace is therefore carved out from the space of the home, and different rules apply.

¹⁹⁴ See *Hadley v. Cox*, 470 So. 2d 735, 736-37 (Fla. Dist. Ct. App. 1985) (reversing restrictions on a child's ability to visit her mother's home at a nudist camp because her father failed to prove that the nudist park was detrimental to the child's welfare).

¹⁹⁵ 542 U.S. 656, 666-70 (2004).

¹⁹⁶ This reading of *Ashcroft* is based on the Court's emphasis on the various ways the regulation would impede adults' First Amendment rights. See *id.* at 667. Another potential way to look at the holding in *Ashcroft* is to view the regulation as infringing on the rights of parents who want their children to enjoy wide Internet access. But even this view of *Ashcroft* conflicts with the holding in *Dale*, because the *Dale* court never considered how the Boy Scouts's views conformed to, or conflicted with, the views of New Jersey parents who permitted their children to be Boy Scouts. See *supra* notes 101-102 and accompanying text.

¹⁹⁷ As one commentator has stated, "the widespread availability of [indecent] material in the larger society makes it virtually impossible for parents to act effectively on their own. Instead, if parents are to have meaningful rights in this area, the community must have the power to regulate the manner in which such material is distributed." Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 608 (2003).

Like the outcome in *Dale*, then, the fate of the nudist summer camps could depend on one court's view of the proper analogy. Camps—even those on private land—could be viewed as similar to cyberspace: a realm where societal norms trump parental prerogatives. This approach, however, could cast doubt on the holding in *Dale*; for if Virginia has a legitimate interest in limiting the manner in which teenagers may live the nudist lifestyle at nudist summer camps on private land, presumably promoting the values of modesty outside of the home,¹⁹⁸ then New Jersey arguably has a legitimate interest in promoting the values of nondiscrimination at places of public accommodation like the Boy Scouts. Analogizing the camps to the home would eliminate this incompatibility. Consistent with *Dale*, parental authority could be extended outside of the home to protect the camps as entities functioning as parental surrogates. Nonetheless, the differing levels of deference to the prerogatives of parents and their surrogates expressed in *Ashcroft* and *Dale* would remain.

For the most part, family law scholars have not theorized what should happen in cases like *White Tail*, due to their general neglect of childrearing between home and school. Although this neglect could be interpreted as reflecting a normative default of parental control in all spaces but school, courts have not embraced that view. Instead, as the cases discussed above indicate, courts have at times extended parental control and at other times thwarted it. This doctrinal inconsistency is significant for family law as a whole, and even for those family law scholars who do not wish to explore childrearing between home and school, because such inconsistency reveals much about the current contours of family privacy.

The cases discussed above signal a partial rejection of the privacy traditionally thought to be afforded to families. Instead of deferring to parents, the cases reveal that courts often permit the state to regulate childrearing that concerns sex and other issues of morality. Even the curfew cases could be viewed as state attempts to limit minors' opportunities to engage in sex, drinking, drug use, and other nighttime activities. The boundaries of family privacy are thus constructed not by respect for parental prerogatives, but by the views of states and

¹⁹⁸ Although the Virginia statute does permit minors to attend nudist summer camps if they are accompanied by a parent or other legal guardian, that requirement, in effect, prevents the camp from operating, because fundamental to the definition of "camp" is the provision of places where children spend time away from their parents. See *supra* note 186 and accompanying text.

courts regarding appropriate sexual conduct.¹⁹⁹ When childrearing conforms to those views, family privacy is respected. When childrearing challenges those views, family privacy ends.

The location of childrearing matters in this construction of family privacy. If the childrearing activities at issue in the above cases had taken place in the family home, the state would not have been permitted to regulate them or to intervene in any other manner, unless the activities amounted to abuse or neglect.²⁰⁰ Because the childrearing in the above cases took place outside of the home, however, the existence of abuse or neglect was not even litigated. Instead, in most instances, courts weighed the state's interests in the challenged regulation against the parents' interests in directing the upbringing of their children. Childrearing was not permitted to exist outside the zone of state power, where it generally exists when performed within the home;²⁰¹ rather, it was subject to the state's views regarding appropriate childrearing.

Such balancing between the interests of the state and parents also occurs when parents challenge state educational regulations governing schools. In those instances, however, the state interest is clear: the education of future citizens.²⁰² In the cases concerning childrearing between home and school, the state's interests are often less clear, and there is little legal precedent evaluating those interests. As illustrated above,²⁰³ analogies to previously recognized forms of childrearing—analogs to childrearing at home or school—often do not provide sufficient guidance to courts, because childrearing between home and school can be distinct from that performed at home or

¹⁹⁹ Cf. Dailey, *supra* note 49, at 956 ("Far from prohibiting state intervention in a prepolitical social sphere, the ideal of family privacy expresses a particular set of family values by protecting only those social relations that the state deems worth protecting."). Other scholars have made a similar point with respect to the state's role in defining family. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 276 (1990) ("Rather than marking a boundary limiting state intervention in the family, laws governing the family define the kinds of families the state approves.").

²⁰⁰ Of course, abuse and neglect can be defined in different ways, and definitions can be particularly expansive if states do not approve of the family form in question. See *supra* note 120 (discussing the work of Dorothy Roberts and Martha Fineman, among others, which reveals that families of color and poor, single mothers are afforded much less privacy than other families). Unlike the cases discussed here, however, the state claims the existence of abuse or neglect *before* it intervenes.

²⁰¹ See *supra* notes 119-123 and accompanying text.

²⁰² See *supra* notes 131-137 and accompanying text.

²⁰³ See *supra* Part II.

school, by parents or teachers. Analytical and normative incoherence can thus result, calling into question the parameters of family privacy.

C. *The Beginnings of a Theory of Childrearing
Between Home and School*

A broader normative view about the interests at stake when childrearing takes place at locations other than home and school could go a long way toward providing a more consistent approach to family privacy, and toward clarifying whether and why location should matter in determining the respect accorded to that privacy. The remainder of this Article sets forth one possible normative approach that could guide courts and others confronted with childrearing between home and school. This discussion also hopes to spur future conversation about the meanings of privacy and pluralism within family law as a whole.

The analysis in this Article supports the conclusion that family law should ensure that the spaces between home and school remain vital locations of children's development and an integral part of civil society.²⁰⁴ One way to achieve this goal is for family law scholars to develop a theory of childrearing that: first, acknowledges the myriad ways that children are socialized outside of school and family; second, explores the ways such childrearing can expose children to diverse ways of life, thereby creating pluralism within the family as well as without; and finally, promotes such pluralism by permitting childrearing between home and school to operate largely free from state control, subject only to limited, inclusion-oriented regulations.

Explicitly acknowledging childrearing between home and school is a necessary first step in redressing family law's neglect of this sphere of childrearing. In this inquiry, location is primarily a threshold issue, or a means to identify a range of childrearing practices that are not currently addressed by the existing scope of family law. Once the practices are identified, the actual location of the practices matters

²⁰⁴ This Article adopts a broad definition of civil society, specifically that articulated by Jean Cohen and Andrew Arato, who define "civil society" as "a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication." COHEN & ARATO, *supra* note 164, at ix. For a brief discussion of disagreements about the proper scope of civil society, see Mark Tushnet, *The Constitution of Civil Society*, 75 CHI-KENT L. REV. 379, 381 n.9 (2000).

much less than do the actors who engage in the socialization of children in those spaces—and the functions they serve.

Acknowledging childrearing between home and school therefore means acknowledging the ways that many children are socialized not just by parents and teachers, but also by many other actors. As discussed earlier in Part I,²⁰⁵ the identities of these actors vary from child to child in ways that often correlate to race, class, geography, religion, gender, or parental preference. The important common denominator, however, is that these actors are neither the children's parents nor their teachers. This difference matters to children. The social science literature indicates that children perceive these actors to be different from teachers or parents, and, as a result, children respond to them differently.²⁰⁶ The current scope of family law implies that this difference is one of lack of influence—that exposure to these actors is not important to child socialization. A theory that acknowledges childrearing between home and school could examine the full range of this difference in any given situation, from lack of influence to reinforcement of parental authority to the positing of alternative ways of life. Moreover, these actors often engage in different types of childrearing than do parents or teachers, frequently conveying information about the practices and preferences of the community and various subcommunities in which children live. Instead of conveying information about a particular family's values, as parents often do, or conveying substantive knowledge and information about the requirements of democratic citizenship, as teachers often do, the actors between home and school convey information about the values of people and organizations existing outside of individual families but not subsumed by the state. This information may overlap with information about community values conveyed by parents and teachers, but it will often be different.

Such transmission of community values may seem obvious, given the Boy Scouts's repeated statements in the *Dale* litigation that the organization seeks to instill values in young people.²⁰⁷ The Supreme Court's analysis, however, focused on the organization's ability to convey its message, not on how that message was received by its youth members. In fact, the Supreme Court did not consider the interests of the boys of the Boy Scouts at all, instead evaluating the case as one

²⁰⁵ See *supra* text accompanying notes 34-38.

²⁰⁶ See *supra* text accompanying notes 38-39.

²⁰⁷ See *supra* text accompanying notes 75-83.

that pitted a private adult association against the state.²⁰⁸ The Court overlooked the actual messages that the boys may have received from the Boy Scouts, or the ways the boys may have been affected by those messages. Family law need not continue this neglect.

After acknowledging childrearing between home and school, family law scholars can explore how this childrearing relates to the tradition of pluralism within family law. Scholars have long explored, and often extolled, the role families play “in maintaining the diverse moral values and traditions that comprise the pluralist foundation of our liberal political order, values and traditions that in turn serve to counter the threat that unmediated state power poses to moral diversity.”²⁰⁹ Indeed, the desire for such pluralism is a primary justification for respecting family privacy and parental control.²¹⁰

Pluralism currently exists only *between* families, however. Our society is pluralistic because many types of families are permitted to exist largely free from state indoctrination. In contrast, pluralism rarely exists *within* families. Children are generally exposed to just one belief system within the family, or at most two.²¹¹ Therefore, although children may not be standardized by the state,²¹² they often are standardized within their own families. Pluralism may exist on a broad, societal level, but children rarely experience pluralism on a micro level, within their own families.

²⁰⁸ See *supra* text accompanying notes 66-75.

²⁰⁹ Dailey, *supra* note 49, at 958-59; see also MCCLAIN, *supra* note 5, at 82 (discussing how “[f]amilies may function as . . . enclaves that can work out and nurture alternative conceptions of self, community, and justice”); Davis, *supra* note 110, at 1371 (“People are not meant to be socialized to uniform, externally imposed values. People are able to form families and other intimate communities within which children might be differently socialized . . .”); Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 786-87 (1989) (describing the mandatory public schooling law in *Pierce* as one that “potentially subjected these individuals to a narrowly directed existence”).

²¹⁰ See *supra* text accompanying note 166; see also Dailey, *supra* note 49, at 1023 (“The family is subject to constitutional protection, therefore, not because it is an arena of negative liberty, as conventional wisdom would have it, but because it serves both to deploy and to constrain the political power of the state.”).

²¹¹ Each child is given just one family, but divorce or other factors may lead parents to convey two, often divergent, belief systems to their children. See, e.g., ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* 84-85 (2005) (explaining that young adults from divorced families rarely perceived their parents’ values as unified or complementary); Minow, *All in the Family*, *supra* note 155, at 288-97 (presenting a general discussion of diversity within families during marriage and postdivorce situations); Volokh, *supra* note 21, at 692-97 (discussing circumstances that can arise after divorce, under which parents may teach different ideologies to children).

²¹² See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

Childrearing between home and school can expose children to other ways of life, thereby making the promise of pluralism more meaningful to children. Children, of course, are still steeped in the traditions of their parents when they interact in the spaces between home and school, but they are also exposed to alternative viewpoints, different ways of living as children, and diverse models for adult life. Other family law scholars have emphasized that children benefit from such exposure because it enables them to later make informed choices about how they wish to live their adult lives. Most of these scholars, however, call on the state to ensure that children are exposed to these messages.²¹³ The analysis in this Article suggests that exposure may be better achieved by fostering pluralism in the spaces between home and school. Such pluralism could serve as an antidote to both state dogma and the standardization that can occur within the family.

The final element of a theory of childrearing between home and school therefore must ask whether the state should intervene to foster or restrain childrearing between home and school, or whether, consistent with the outcome in *Dale*, the state should leave those spaces unregulated, permitting parents and nonstate entities to engage in the childrearing practices of their choice with neither support nor discouragement from the state. This Article suggests that the answer lies somewhere in between. Given the traditional emphasis on pluralism in family law, state regulation seems undesirable because it risks imposing a narrow, state-sanctioned view of childrearing upon the spaces between home and school, potentially infringing on parents' ability to convey their own values to their children. Indeed, such an approach would, in many instances, give the state some measure of control over more than half of children's everyday lives. However, if family law also cares about fostering pluralism within the family, then nonregulation also seems undesirable, because it would cede childrearing between home and school to the control of parents and their surrogates. Im-

²¹³ See, e.g., MCCLAIN, *supra* note 5, at 79-80 (“[T]olerant should not extend to . . . systems of family governance that would replicate” intolerant or oppressive worldviews); Dena S. Davis, *The Child’s Right to an Open Future: Yoder and Beyond*, 26 CAP. U. L. REV. 93, 93-97 (1997) (defending, in qualified terms, the right of the state to intervene when “parents . . . make choices for their children that dramatically limit the children’s possibilities for an open future”); Dolgin, *supra* note 18, at 383-88 (contending that *Yoder* did not rest on a general right of parents to shield their children from the broader culture); Woodhouse, *supra* note 48, at 1117-22 (arguing that, while “[n]either the state nor the parent owns” children, “each must genuinely love them and take responsibility for their future”).

portant opportunities to expose children to the diversity of the broader civil society would therefore be lost.

Accordingly, a broad conception of pluralism can best be served by permitting childrearing between home and school to operate largely free from state control, subject only to limited inclusion-oriented, or pluralism-enhancing, regulations.²¹⁴ Actors engaged in childrearing between home and school, such as the Boy Scouts or the White Tail Park summer camp, would be permitted to engage in the childrearing of their choice, much as parents are permitted—and even encouraged—to do. But because the space between home and school often provides the most meaningful opportunities for children to experience pluralism, these actors would not be permitted to operate completely outside the zone of state power.²¹⁵ Rather, the state should intervene in a limited way to ensure that the actors do not thwart the potential of these spaces to expose children to diverse ways of life within the broader civil society.

In the context of the *Dale* litigation, this normative approach would mean that the Boy Scouts would not be permitted to exclude Dale as a troop leader, because the state of New Jersey has decided, in passing its public accommodations law, that discrimination against homosexuals in spaces like the Boy Scouts is at odds with the state's conception of civil society. The state therefore has affirmed that it supports the type of pluralism articulated here. Moreover, application of the public accommodations law would serve the approach's pluralism-enhancing goals by exposing boys to multiple ways to live as men.²¹⁶ The Boy Scouts, of course, loses a considerable amount of pri-

²¹⁴ Church and other religious activities are exempted from this analysis, given the unique First Amendment protections extended to those activities. I hope to consider church-based childrearing in future work.

²¹⁵ Cf. MCCLAIN, *supra* note 5, at 27 (“Civil society is not a realm free of governmental regulation.”). Thus, the spaces between home and school would resist easy classification as part of either the public or private realms. The spaces would not be subject to full regulation as part of the public sphere, but they would not be exempt from regulation as part of the private sphere either. As such, many of the downsides of state regulation could potentially be avoided. For an account of these downsides in different contexts, see Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541, 1544-54 (2001).

²¹⁶ Andrew Koppelman has emphasized that gay children, both in and out of the Boy Scouts, could benefit from the application of New Jersey's public accommodations law in this context, particularly if their parents are not open to embracing homosexuality within the family. See Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right To Discriminate?*, LAW & CONTEMP. PROBS., Autumn 2004, at 27, 43-47. But other children could benefit as well. Children who have previously received only limited messages about homosexuality could benefit; children who will eventually work

vacy under this theory, because the organization would no longer be exempt from state public accommodations laws. This loss, however, is solely a function of the Supreme Court's allocation of more privacy to the Boy Scouts than to other private associations, such as the Jaycees, which are already subject to state public accommodations laws.

The theory articulated here, in contrast, views organizations like the Boy Scouts as particularly worthy of being subject to state public accommodations laws, because the Boy Scouts is a private association engaged in childrearing. Private associations are generally not permitted to operate outside of the zone of state power. Indeed, as the Supreme Court opinion in *Jaycees* makes clear, private associations are subject to limited state regulation even when adults' interests are the only interests at stake. It seems counterintuitive to relax such regulations when children's interests also are at stake, given that the state has an interest in modeling diverse behavior to children, in preparation for their future roles in civil society.

In the context of the *White Tail* litigation, this normative approach would mean that the state could not enact regulations, such as the one at issue in that case, that, in effect, prevent the camp from engaging in its desired form of childrearing. Some may question whether this outcome actually supports the goal of pluralism, given that children who attend nudist camps most likely have nudist parents. However, the approach articulated here does not mandate that children be exposed to ways of life that are radically different from their parents' ways of life (and, presumably, children of nudists are already exposed to the clothed lifestyle at school and in various commercial spaces). Rather, the spaces between home and school can also expose children to different ways of living within their parents' tradition. If nudists are like most groups, there is likely much diversity even within the group.

Some parents, like the parents in *White Tail*, likely will welcome the opportunity for their children to engage in such pluralism-enhancing activities. Although family law scholarship frequently extols parental control, many parents might find that they need or want

and live with gays and lesbians could benefit; and all children could benefit from a broader notion of how to perform one's gender and live one's sexual life. Indeed, both boys and girls may feel particularly limited by narrow constructions of gender and sexuality, and they often can benefit from exposure to alternative ways to live as men and women in this world. See, e.g., Gagen, *supra* note 31, at 214-15 (discussing the work of Judith Butler); see also sources cited *supra* note 88 (analyzing the harm caused by institutions that inculcate rigid gender roles).

support from nonstate actors in the often overwhelming task of shaping young lives.²¹⁷ By explicitly acknowledging childrearing between home and school, and fostering such childrearing through pluralism-enhancing regulation and nonregulation, the theory proposed here—in contrast to the *Dale* opinion—would affirm that the responsibilities of childrearing need not be shouldered solely in private, but rather can be a vital part of the broader civil society. The theory thus could support parents while still respecting their prerogatives.

Other parents may be opposed to pluralism-enhancing activities. The theory articulated here does not intrude on the prerogatives of these parents, either. Rather, pursuant to existing notions of family privacy, parents still have a right to limit their children's participation in the spaces between home and school. Nothing in this Article attempts to change that right. But once parents permit their children to participate in those spaces, there is no need for the law to view the spaces as outside of the zone of state power. Rather, the law can ensure that the spaces between home and school remain vital locations of children's development by exposing children to diverse ways of life. In this way, the law can promote pluralism both within the family and without.

²¹⁷ A few family law scholars, most notably Dorothy Roberts and Clare Huntington, have recently begun to call for a somewhat similar approach in the abuse and neglect context. See Huntington, *supra* note 2, at 693 (defending the need to “reorient society’s views of abuse and neglect away from the view that [they] are products of parental pathology, and toward a view . . . where a broader group . . . claims responsibility for the larger circumstances that led to the abuse or neglect”); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 27-35 (2005) (discussing the “community approach” to social work in child welfare cases). These scholars argue that abuse and neglect regimes in most states set up a false and unnecessary choice between parental control and state involvement, particularly in cases of poverty-related neglect as opposed to physical or sexual abuse. These scholars propose that, instead of leaving parents alone until they default and then removing the children to the custody of the state, the state should enlist the help of community members to devise case plans whereby children at risk of neglect can remain with their parents if they receive support from community members. Such support can remedy immediate family problems, and the ties to the community that develop in the process of such problem solving can strengthen the family for the future. There is no reason to assume that such community involvement can benefit only those parents at risk of committing abuse or neglect. See, e.g., Sugarman, *supra* note 56, at 1 (“The key message is that [most] parents need help, not only from extended family members and the community at large, but also from government.”). In addition, various studies show that families are much less likely to become subject to state abuse and neglect proceedings if they have ties to the community. Huntington, *supra* note 2, at 680-81.

CONCLUSION

Acknowledging and examining childrearing between home and school can, without any further analysis, go a long way toward achieving family law's goal of reflecting and supporting family life. The acknowledgment that such childrearing exists, that it is performed by diverse actors previously unrecognized by family law, and that children often respond to it differently and receive different messages than they do at home and school, will hopefully lead to a more robust conception of child socialization within family law.

Such acknowledgement also can clarify what is at stake for family law in the home and school spaces. The existing scope of family law primarily defines home and school by relation to one another: home is what school is not, and vice versa. This approach is consistent with social science theories emphasizing that home is more than a spatial description, but instead also exists as a conceptual category.²¹⁸ Nonetheless, such an expansive legal conception of home risks obscuring the importance of the physical home and the activities that occur therein. Similarly, an expansive conception of school can dilute the state's focus on educating future citizens. Acknowledging and examining the childrearing that occurs between home and school thus could increase family law's understanding of childrearing in all locations, including home and school.

Beyond better reflecting family life, such analysis can spur reconsideration of some of the fundamental normative positions of family law as a whole. This Article has shown how analyzing childrearing between home and school can call into question family law's existing approaches to privacy and pluralism. By focusing on pluralism *between* families, family law has often overlooked the ways that there is little to no pluralism *within* families—largely because of family privacy. Indeed, family law scholars rarely have discussed what pluralism means for individual family members, or how the promise of pluralism might be made more meaningful for individual family members. This Article has proposed one way to address these questions, by showing how the law's recognition of childrearing between home and school could increase children's individual experiences of pluralism, while also preserving the family's role in maintaining a diverse, pluralistic society.

²¹⁸ See, for example, the studies of home discussed in Christensen et al., *supra* note 44, at 141-42.